Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-39

MEMPHIS LIGHT, GAS AND WATER DIVISION; CALVIN HENZE, HENRY T. WINKELMAN, ELIOT WHITTINGTON, ROBERT S. BOWERS and PATRICIA SHAW, Commissioners, Petitioners,

V.

WILLIE S. CRAFT and MARY CRAFT, MS. IDA BELL HOLMES, MS. ANNA SUE FUNZIE, MS. SARA PARKS, Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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No.

MEMPHIS LIGHT, GAS & WATER DIVISION, et at., Petitioners,

V.

WILLIE S. CRAFT, et al., Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

The petitioners Memphis Light, Gas and Water Division, Calvin Henze, Henry T. Winkelman, Eliot Whittington, Robert S. Bowers and Patricia Shaw respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit filed April 12, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is printed as Appendix "A." The opinion of the District Court for the Western District of Tennessee was not reported but is printed as Appendix "B."

JURISDICTION

The opinion of the Sixth Circuit was filed on April 12, 1976.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is utility service, including utility service without payment of charges, a property right which is protected by the Due Process clause of the Fourteenth Amendment?

2. Assuming utility service is "property," must there be a prehearing termination procedure before cutoff or is the termination procedure of the Memphis Light, Gas and Water Division a constitutionally sufficient procedure meeting the minimum requirements of due process of law?

3. Are the cutoff policies of the Memphis Light, Gas and Water Division, a municipally owned utility, which operates in a proprietary capacity without governmental immunity but on a nonprofit basis, subject to the provisions of the Fourteenth Amendment requirements of due process?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment to the United States Constitution and of the Charter of the City of Memphis are set forth in Appendix "C" hereto.

STATEMENT OF THE CASE

History of the Litigation.

The plaintiffs as customers of the Memphis Light, Gas and Water Division filed suit alleging that utility services had been terminated without due process of law as required by the Fourteenth Amendment. The plaintiffs filed suit on their own behalf and as a class. The District Court Judge suggested and the Memphis Light, Gas and Water Division agreed not to terminate the utility services of the named plaintiffs pending the trial on the merits so long as regular payments for current uses of utilities were made. Any arrearage would not be paid pending the outcome of the suit. The Trial Judge held that the cause was not a proper class action and the Sixth Circuit agreed.

The Trial Judge held that the Memphis Light, Gas and Water Division had not violated any of the plaintiffs' rights to due process of law although the District Court suggested but did not require that the defendants change the notices of termination to provide more specific information about customer service location and personnel available to work out extended payment plans or adjustments of accounts in genuine hardship or appropriate situations.

The Sixth Circuit affirmed that no class action was applicable but held that utility service was a property right entitled to due process. The Sixth Circuit Court of Appeals held that the shutoff notice was constitutionally insufficient to advise of the steps to settle *disputes* and further there was no constitutionally sufficiency hearing procedures established by the Memphis Light, Gas and Water Division.

The Sixth Circuit held that the "final notice" was sufficient for a customer with an admitted inability to pay and for which credit counselor for assistance and utility payment plans were available. No review is sought on this holding.

The Sixth Circuit also held that plaintiff Holmes was correct and Memphis Light, Gas and Water Division was in error to refuse to initiate service to her because of past due bills of her common law husband. No certiorari is requested concerning this phase of the case but is limited to the question of property rights, state action and due process.

Organization of Memphis Light, Gas and Water Division

The Memphis Light, Gas and Water Division was created by an amendment to the Charter of the City of Memphis. The president is appointed by the Mayor and approved by the City Council and required to devote his full time to the management of utility services. Four other citizen members are appointed to the Board of Commissioners by the Mayor and approved by the City Council.

The Memphis Light, Gas and Water Division is to operate on a non-profit basis and was established for the purpose of providing low utility rates to the City of Memphis. (Appendix "C".) The revenue received each year from the operation of the Division is used to pay operating expenses, capital improvements, reserves and payment in lieu of taxes with any surplus required by the Charter to be devoted solely to rate reduction.

The Memphis Light, Gas and Water Division, hereinafter referred to as the "Division" is in the service area for electricity of the Tennessee Valley Authority whose rates the General Accounting Office report are approximately forty-five percent (45%) lower on an average than are power rates in the rest of the United States. The Division has approximately 235,000 residential consumers of electricity, 200,000 residential consumers of gas and 165,000 residential consumers of water. Some multiple dwellings have only one meter for water whereas there are individual meters for electricity or gas to the customers.

Billing Procedures in Question

A new or slow pay customer of the Division may have approximately sixty-five (65) days of service without payment before there is a termination.

The service area of the Division is divided into twenty-one (21) cycles representing the approximate number of working days per month. Each cycle of meters is read on a rotating basis throughout the month and all meters are read every month except for unusual circumstances.

The bill is mailed approximately four (4) days after the meter reading date.

A second bill or final notice which includes a flyer concerning certain information about payment or budget payments is thereafter mailed. If no payment is received, one service is terminated and if no further payment is made within seven (7) days, then the remaining two services are terminated.

During a six (6) month period as shown by the interrogatories from September, 1973 through February,

1974, approximately 106,000 final notices were sent out to customers, both residential and commercial. This is approximately 17,000 notices per month. During this six-month period, there were approximately 12,000 one service terminations or 2,000 per month. Eighty-eight percent (88%) of the customers receiving a final notice either paid or made arrangement through the extended payment or credit plan and eleven percent (11%) received termination.

A new customer or a customer with a history of slow pay or other credit activity can receive service for approximately sixty-five (65) days before termination of his utilities. An example was given by written exhibits assuming the beginning of a cycle on January 2 of the year. (See Appendix "D.") A customer with service beginning on January 2 would have his meter read on January 31 and the bill would be mailed (depending on the weekend) four (4) to six (6) days later. The last day to pay the net amount would be February 20 or approximately twenty (20) days after the meter reading. The original bill spells out the last day to pay the net amount. On February 25 or five (5) days after the last day to pay the net amount, if the Division has not received payment from the customer, then he will receive the red or final notice in an envelope. The red bill is enclosed in an envelope to assure the privacy of this individual. On the red bill or final notice it gives a specific date that the services will be terminated.

Included with this red bill or final notice is a stuffer or flyer which may have on the bill (depending upon the location of the customer) when and where credit counselors will be available at a branch office either in north Memphis or south Memphis. It appears as stated by the Sixth Circuit that the flyer to the north and south

Memphis area where there were credit problems stated that if you were having difficulty paying your utility bill you would bring the bill to the neighborhood credit counselors for assistance as well as coming to the main office. The other flyer going to other areas stated:

> "If you are having difficulty paying your utility bill and would like to discuss a utility payment plan, or if there is *any dispute* concerning the amount due, bring your bill to the office at 220 South Main, Monday through Friday, or phone 527-0311."

There are approximately thirty-five (35) to forty (40) employees in the information center who receive telephone calls, including telephone calls concerning requests for extensions for payment of bills.

These employees are authorized to grant up to three (3) days extension for the payment of bills which would bring the person within one (1) day of the next meter reading cycle by the meter reader. Upon contact these service advisors can instantly void a cutoff order through access to the computer located at their desk.

Upon receipt of a final notice including the information in the stuffer or flyer, the next step is for the customer to contact the credit office. If the customer does not contact the Division, the next step is for the meter reader to disconnect one service as of March 1.

The meter reader is instructed to knock on the door and to make every attempt to get someone to the door. If no response, then a green tag is left at the door that is the most obviously used for entrance to the premises. The language of the door knocker card is that it is a disconnect service order (DSO) and that the Division

would be pleased to reconnect the service later today if the card and the red final notice is taken to the nearest store accepting utility payments or to the main office to pay the bill. If this is done before 4:00 P.M. then customer service may be called and upon showing of the receipt when the service man arrives, the service will be connected. If after 4:00 P.M. the service man may not get to the home until the next working day.

If the meter reader contacts the customer and the customer claims someone in the house is sick and the meter reader is so convinced, then no cutoff will be made. If the customer states he has mailed a check or money order, the meter reader is to question him as to when mailed and the amount, but to leave all services on. If there are indications that the customer has been absent for a period of time, possibly on vacation, no cutoff is made and the ticket is marked "vacation." If a customer has a paid receipt then no cutoff is made.

If a customer has not paid the bill then the door-knocker card is filled out and left with the instructions above. If the customer has received an extension either over the telephone or "passed" by the meter reader and no payment or arrangement has been made within three (3) days, then a customer service man will be dispatched on March 7 or approximately five (5) days later and all services will be terminated.

The customer therefore has had approximately sixty-five (65) days of service without payment, having received a bill giving date to pay, a final notice with a leaflet advising him to contact the neighborhood credit office or to come to the Division for credit arrangements or in some possible instances to "discuss disputes." Further, there was a personal contact or an attempted

personal contact by the meter reader before any service was terminated.

The Sixth Circuit did not attack the extended payment plan and credit counselors of the Division but only that no procedure was open for discussions on disputes.

The record further indicated that if a customer complained about the amount of his bill being too high, an investigation of his meter was made upon request and cutoff procedure delayed.

The issue concerning the dispute between the Division and Mr. and Mrs. Craft arose when the Craft's purchased a house which had two (2) meters for providing gas and electric service. The residence had in fact previously been used as a duplex. The Craft's received split billing, that is each meter registered the gas and electricity used in a particular portion of the house. The matter was further complicated because the Craft's were advised to have one of the meters removed and the electrician removed the electric meter from one account and the plumber removed the gas meter from the other account so that the Craft's continued to receive two bills because of the mistakes of the independent contractors which was later rectified by combining the accounts.

REASONS FOR GRANTING THE WRIT

1. THERE IS A CONFLICT BETWEEN THE SIXTH CIRCUIT COURT OF APPEALS AND THE TENNESSEE SUPREME COURT THAT WATER OR UTILITY SERVICE IS A PROPERTY RIGHT.

The Tennessee Supreme Court in *Patterson v. City of*

Chattanooga, 192 Tenn. 267, 241 S.W.2d 291, was considering the question of whether or not the water company may discontinue the water service for the refusal of the property owner to pay the sewer service charge. The Court asked the question of whether the discontinuance of the water service deprived the owner of *property* or *property rights* in violation of the Tennessee Constitution or the United States Constitution. It held that the general rule is that those furnishing the general public with its water supply, either in a private or a *municipal capacity*, may adopt, as a reasonable regulation for conducting said business, a rule providing that the water so furnished may be cut off for nonpayment therefor; and in pursuance of such regulation the water supply may be discontinued on the failure of the consumer to pay the water rate. The Supreme Court further held that it was a reasonable rule to allow disconnection of the water for failure to pay the sewer fees. The Tennessee Supreme Court has therefore held that the discontinuance of water for failure to pay water rates or sewer rates is not the deprivation of property or property rights.

The Tennessee Supreme Court determined as early as 1902 that a person has no property right to utility services without payment. *Jones v. Nashville*, 109 Tenn. 550. The Tennessee Supreme Court, in construing an ordinance setting up rules and regulations for principal water services, stated as follows:

> "Every inhabitant of the city is secured a continuous supply of water by complying with its provisions, and any of them, regardless of their circumstances in life, will be refused water upon their failure to observe them. Its execution is certain and nothing is left to the discretion or caprice of the officers of the defendant. It is just, in that it provides that all the inhabitants of the city shall pay their proper proportions of the expense of this almost indispensable public service. It is plain and unambigous in its terms and all parties are informed by it upon what terms they will be supplied with water, and under what circumstances and when the supply will cease."
>
> 109 Tenn. at 560.

Tennessee is reasonable in its regulations. In *Farmer v. Nashville*, 127 Tenn. 509, the Tennessee Supreme Court followed the reasonable rule that although water or utilities may be denied for failure to obey rules such as payment of charges this cannot be applied to require a tenant to pay water charges of a delinquent owner in order to secure services. Our Tennessee Supreme Court found that a requirement to deal only with landhold owners and refusal to run accounts or furnish water to tenants would be discrimination and the utility could not discriminate between inhabitants who own property and those who do not. This is similar to the holding in *Davis v. Weir*, 497 F.2d 139 (5th Cir. 1974).

The Memphis Light, Gas and Water Division is a nonprofit organization. As shown by the Charter, its rates are to be set to pay reasonable expenses and to operate on a nonprofit basis. After the payment of the purchase price of electricity or gas or the cost of pumping water, reserve payments in lieu of taxes, and similar necessary expenses, any surplus funds are to be used for the reduction of rates.

The Charter also contains the provision that the Board of Commissioners of the Memphis Light, Gas and Water Division shall make rules and regulations for carrying out the provisions.

The Memphis Light, Gas and Water Division is required, as a municipal utility, to have nondiscriminatory rules and regulations. It must have reasonable rates which do not discriminate between customers; it must offer its services to all with certain exceptions such as the payment of reasonable cost for extensions.

The Division, like a private utility, has tort liability and may be required to pay damages to its customers if it deprived them of services improperly.

The duty of the Division is to avoid bad debts if possible. It established a budget plan and the Sixth Circuit found that such plan was sufficient and provided proper notice and consultation with credit counselors.

The record does not show any failure to connect services at new addresses under different names. In fact, the testimony in this record indicated that Mrs. Parks or Mrs. Holmes both had utilities connected in their sons' names while they owed for delinquent services although they were the real party in interest and receiving benefit of the utility.

No evidence supports any allegation that a customer did not have an opportunity for a hearing by a trained credit counselor with access to supervisors. Whether the notice said contact a credit counselor or whether the notice did or did not mention disputes, the enclosure in the final notice notifies the customer to contact the Division.

The records do not show any insensitivity to large numbers of customers or an insensitivity to customers' need for extension of credit. In fact the record shows that on a complaint of a high bill, 33,000 meters were reread during the year to verify services.

The holding, therefore, that the entitlement to utility services is property requiring a pretermination hearing as well as additional requirements of notice is contrary to the decisions of the Tennessee Supreme Court.

2. THERE IS A CONFLICT OF DECISIONS OF THE UNITED STATES COURT OF APPEALS ON WHETHER OR NOT UTILITY SERVICES CONSTITUTE PROPERTY WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT.

This Court reserved the question of whether the utility services were property in deciding *Jackson vs. Metropolitan Edison Company*, 419 U.S. 345, 95 Sup. Ct. 449, 42 L. Ed. 2d 477. The Third Circuit, however, in its decision reported at 483 F. 2d 754, found that the right to electric services was not property. In a recent case of *Koger v. Guarino*, the District Court for the Eastern District of Pennsylvania distinguished *Jackson v. Metropolitan Edison Company*, supra; by stating that it applied to electric service but that water service was a property right. 44 *Law Week* 2528. The Fifth Circuit in *Davis v. Weir*, 497 F. 2d 139 (1974), and various District Court decisions within Circuits have held that utility services are property and are cited in the Opinion of the Sixth Circuit. In addition to the *Jackson* case, *Lucus v. Wisconsin Electric Power Company*, 466 F. 2d 638, also implies that utility services is not property (7th Cir.). In order to eliminate conflicting decisions within the Circuits, a writ of certiorari should be granted in order to resolve the conflict and this important question.

3. THE ISSUES OF WHETHER UTILITY SERVICES ARE PROPERTY AND, IF PROPERTY, WHAT PROCEDURAL DUE PROCESS AND EQUAL

PROTECTION IS NECESSARY ARE ISSUES OF NATIONAL IMPORTANCE.

The Memphis Light, Gas and Water Division is a municipally owned utility. According to the American Public Power Association, there are over 1,400 municipally owned electric power companies belonging to that organization. In addition, there are numerous municipal water companies so that a determination that the operation of the electric or water system is state action and that utility services are property is of significant importance to these utilities and their customers.

The costs of energy has been rising in excess of ordinary living costs. Utility costs now take a significant amount of the average person's pay. One indication that utility services are a larger portion of the average person's budget is the rising amount of bad debts. Utility companies sensitive to their customers have established budget plans and procedures to insure reasonable payment without discontinuance of services.

This Court reserved in *Jackson v. Metropolitan Edison*, supra, the question of whether or not utility services were property so that such services could not be terminated for nonpayment without procedural due process.

This Court has indicated that property interest may take many forms. A statement of the general principles of what is property is set forth in *Board of Regents of State Colleges vs. Roth*, 408 U.S. 564, 92 Sup. Ct. 2701. This Court states:

"Certain attributes of "property" interests protected by procedural due process emerge from these deci-

sions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily determined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

"Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement of those benefits."

92 S. Ct. at 2709

There is no state law which supports an absolute right to utility services when payment for such services is not forthcoming.

As stated in the Tennessee case of *Jones v. Nashville*, supra:

> "A notice is required to be given of the amount due and the time within which payment must be made before the supply is turned off, and no one can be taken by surprise, or should be unprepared to meet their just dues for the service rendered them."
>
> 109 Tenn. at 560.

There is, of course, a desire for continued utility services to enjoy air conditioning, watering one's lawn as

well as drinking water, but such should not be a property right under the Fourteenth Amendment. The right to continued service should be left to the reasonable rules of the utility either controlled by a State Utility Commission which requires nondiscriminatory rules and regulations or as controlled by a municipality which answers to the people.

Lindsey v. Normet, 405 U.S. 56 92 Sup. Ct. 862, is analogous in that this Court did not denigrate the importance of decent, safe and sanitary housing but were unable to perceive in the Constitution any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. We believe likewise that utility services are also not guaranteed as a property right.

If this Court determines that the right to utility services is property so that termination for nonpayment requires procedural due process, then this is still an important question requiring this Court to give additional guidelines or principles for utilities to use in determining the requirements.

The procedures for termination of the Memphis Light, Gas and Water Division have been fairly fully set out in the Statement of the Case. Petitioners naturally believe the procedures for termination would meet any reasonable standard of procedural due process and that a pretermination evidentiary type hearing is not required. The petitioners contend that the right to consult credit and collection counselors who not only arrange

budget payments but extensions and who also can verify amounts of bills including re-reading of meters (33,000 were re-read upon complaints of high bills) is sufficient for any procedural due process.

Justice Marshall in his dissent in *Jackson v. Metropolitan Edison*, supra, indicated that the solution to the problem was to require an abbreviated pretermination procedure. He stated that at a minimum, due process would require advance notice of a proposed termination with a clear indication that a *responsible* company officer can readily be contacted to consider any claim of error. The Memphis Light, Gas and Water Division has a number of credit and collection counselors. While these will not be eliminated, Justice Marshall seems to indicate that there should be some type of Hearing Officer designated. In a large utility, this might cause delays instead of numerous credit and collection counselors with a supervisor on duty to handle any unusual problems.

Petitioners believe that this Court should determine that flexible due process procedural protections are demanded in balancing the rights of the utility with the rights of the consumer if the right to utility services is property. This Court in its recent decision of *Matthews v. Eldridge*, ... U.S. 44 *Law Week*, 4224, seems to outline the general principles which are considered in balancing. Petitioners contend that the Division procedures are consistent with these principles and meet Due Process standards.

The petitioners respectfully submit that the procedures of the Memphis Light, Gas and Water Division giving ample time for payment of the net amount, adequate notice of final payment and adequate explanation of the

right to contact company officials together with the personal contact or attempted personal contact and door-knocker notice left upon termination.

4. THE OFFERING OF UTILITY SERVICES BY A MUNICIPALLY OWNED UTILITY IS SUBSTANTIALLY SIMILAR TO A PRIVATE UTILITY.

The Court of Appeals for the Sixth Circuit stated that since the utility is municipally owned and controlled by the City that its actions are clearly "state actions."

The petitioners contended that under its Charter it operated as any private utility would operate in that it is required to have rates sufficient to meet its operating expenses and has no governmental immunity.

The operation of the utility services by a municipality has traditionally been a proprietary function. It is subject to suit by its customers for failure to extend services to them or of denying services to its customers. The customer may sue for damages. A municipal utility, just like the private utility, must extend services on a nondiscriminatory basis to all customers alike. It must adopt rates which are nondiscriminatory. It operates in all ways similar to a private utility except that its rates are set by the municipality, in most cases, as opposed to a state public service commission. Likewise, the officers of the utility are appointed by public officials. In the case of petitioners, the President and Board of Commissioners are nominated by the Mayor and approved by the Council and are subject to removal by them. Except for the appointment of such officers, the utility operates and functions like a private utility. A survey of other municipally owned utilities would find

that these utilities buy their electric power from not only Tennessee Valley Authority or other public bodies, but buy their power from private power distributors so that their rates for purchase of power are set for them by state commissions or the Federal Power Commission. Those purchasing gas from interstate gas distribution pipelines have the rates approved by the Federal Power Commission.

The Court should not hold as a general rule that the actions of a municipally owned utility are different from a private utility merely because of municipal ownership.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,
/s/ Frierson M. Graves, Jr.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served upon opposing counsel this Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit by mailing three (3) copies thereof postage prepaid to Thomas M. Daniel, Legal Services Association, 531 South Parkway East, Memphis, Tennessee, 38106.

This ..... day of July, 1976.

FRIERSON M. GRAVES, JR.

APPENDIX A

No. 75-1350

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIE S. CRAFT and MARY CRAFT, Husband and Wife; Ms. IDA BELL HOLMES; Ms. ANNIE SUE FUNZIE; Ms. SARAH PARKS, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

MEMPHIS LIGHT, GAS AND WATER DIVISION; CALVIN HENZE, President and General Manager of Memphis Light, Gas and Water Division; HENRY T. WINKELMAN, Vice-President and member of the Board of Commissioners; ELIOT WHITTINGTON, Commissioner; ROBERT S. BOWERS, Commissioner; PATRICIA SHAW, Commissioner; and An Unknown Number of Unnamed Utilities Termination Personnel, on behalf of themselves and all others similarly situated,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Tennessee, Western Division.

Decided and Filed April 12, 1976.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PECK, Circuit Judge. Named plaintiffs-appellants, Willie S. Craft, his wife Mary Craft, Sarah Parks, Ida Bell Holmes, and Annie Sue Funzie[1] filed this purported class action in district court challenging defendants-appellees' policies of terminating and of refusing to connect electric, gas and water services (collectively hereinafter "utilities") as unconstitutionally denying appellants' classes procedural due process and equal protection, respectively. The district court, after trial, found that there was no civil rights jurisdiction over municipally-owned MLG&W,[2] that a class action would be inappropriate, and, distinguishing *Palmer* v. *Columbia Gas*, 479 F. 2d 153 (6th Cir. 1973), that appellees' termination procedures comported with constitutional due process. We affirm in part, reverse in part, and remand.

CLASS ACTION

Preliminarily, we find no error in the district court's refusal to certify a class action. The district court

> "conclude[d] that this is not a proper case for class action (as to damages), however, except to the extent of declaratory judgment or other relief granted which

[1]The Crafts, Parks and Funzie asserted due process violations stemming from terminations, Holmes the equal protection violation from refusal to connect. The Crafts' termination allegedly arose from disputed bills, Parks' from MLG&W's failure to bill for several months, thereby preventing her, as a person of "limited income" from being able to pay one large bill, and Funzie's also from her inability to pay an "extremely large" first bill from her "quite limited income." No error is assigned on appeal in the district court dismissal of the Funzie claim. Indeed, appellants' counsel admits that Funzie failed to testify at trial "because, by agreement of counsel for both parties, her utilities had been terminated for failure to pay for current usage of utility services about which there was no dispute." Appellants' Brief 5. Funzie, therefore, will not hereinafter be referred to.

[2]See *Amen* v. *City of Dearborn*, —— F.2d —— (No. 74-1650, 6th Cir., filed March 24, 1976).

> may accrue to the benefit of others similarly situated to [appellants]. The question of fact common to members of the class on the question of damages, particularly, and also with respect to circumstances of a purported dispute over charges would predominate as to individuals rather than all members of the alleged class. The Court is not convinced that claims of the representative parties are typical of claims that may be made by the purported class with regard to various and myriad situations or circumstances pertaining to due process violations, if any."

As to a Fed.R.Civ.P. 23(b)(3) class asserting damage claims,[3] there would be no predominate common question of fact. See *Carter* v. *Kilbane*, 519 F.2d 1370 (6th Cir. 1975); *Hayes* v. *Board of Regents*, 495 F.2d 1326, 1329 (6th Cir. 1974). As to a Rule 23(b)(2) class asserting claims to injunctive and declaratory relief, the district court properly recognized that such relief to the extent "granted [would] . . . accrue to the benefit of others similarly situated," and, consequently, as the Eighth Circuit has recognized, "[n]o useful purpose would be served by permitting this case to proceed as a class action" because "[t]he determination of the constitutional question can be made by the Court and the rules and regulations determined to be constitutional or unconstitutional regardless of whether this action is treated as an individual action or as a class action." *Ihrke* v. *Northern States Power Co.*, 459 F.2d 566, 572 (8th Cir.), *vacated and remanded to dismiss as moot*, 409 U.S. 815 (1972). Accord, *Carter* v. *Butz*, 479 F.2d

[3]Appellants never expressly asserted a 23 (b) (3) class for damage claims, and their amended complaint explicitly admitted that, "while [they] bring this action for money damages as well as injunctive relief, the non-monetary issues clearly predominate over the monetary issues."

1084, 1089 (3rd Cir.), *cert. denied*, 414 U.S. 1094, 1103, (1973); *Martinez* v. *Richardson*, 472 F.2d 1121, 1126-27 (10th Cir. 1973); *Cockerel* v. *Caldwell*, 378 F. Supp. 491, 494 (W.D. Ky. 1974) (three-judge court); *Doe* v. *Wohlgemuth*, 376 F. Supp. 173, 181-82 (W.D. Pa. 1974) (three-judge court), *vacated on other grounds sub. nom. Doe v. Beal*, 523 F.2d 611, 613, n. 2 (3rd Cir. 1975) (en banc); *Koehler* v. *Ogilvie*, 53 F.R.D. 98, 101 (N.D. Ill. 1971) (three-judge court), *aff'd mem.*, 405 U.S. 906, 92 S.Ct. 938, 30 L.Ed.2d 777 (1972; *Holt* v. *Brown*, 336 F. Supp. 2, 6 (W.D. Ky. 1971) (three-judge court); *Nelson* v. *Likins*, 389 F. Supp. 1234, 1239 (D.Minn. 1974); *Mohr* v. *Jordan*, 370 F. Supp. 1149, 1151, n. 3 (D. Md. 1974); *aff'd*,—— F.2d —— (No. 74-1496, 4th Cir., filed July 31, 1974); *Rappaport* v. *Katz*, 62 F.R.D. 512, 515 (S.D.N.Y. 1974).

DUE PROCESS

On the merits, the Fourteenth Amendment requires due process only if "state action" is "depriv[ing] any person of life, liberty, or property." See, e.g., *Goss* v. *Lopez*, 419 U.S. 565, 95 S. Ct. 729, 735-36, 42 L.Ed.2d 725 (1975); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 95 S. Ct. 449, 453-57, 42 L.Ed.2d 477 (1974).

Appellees claim that the due process clause has no application because MLG&W "operates just like a private utility in that it is required to have rates sufficient to meet its services . . . and has no governmental immunity." We conclude, however, that since it is municipally owned and controlled, the action of MLG&W are clearly "state actions." *Davis* v. *Weir*, 497 F.2d 139, 143-44 (5th Cir. 1974); *Stanford* v. *Gas Serv. Co.*, 346 F. Supp.

717, 720 (D. Kan. 1972). *Jackson, supra*, is inapposite because the majority and two dissenters independently recognized the distinction between "private utility compan[ies] and . . . municipal utility," 95 S. Ct. at 454 n. 8, or "state [government] — owned" companies. 95 S. Ct. at 464. The majority, in fact, at least five times recognized that Metropolitan Edison was "private" or "privately owned and operated." 95 S. Ct. at 451, 453, 454 n. 8, 457.

Though the Supreme Court has refrained from deciding whether a "claim to continued [utility] service was 'property' " for due process purposes, 95 S. Ct. 457, this court in *Palmer*, *supra*, implicitly assumed and other courts have expressly held that claims to continued utility service constitute "property." *Condosta* v. *Vermont Electric Cooperative, Inc.*, 400 F. Supp. 358, 365-366 (D. Vt. 1975); *Donnelly* v. *City of Eureka*, 399 F. Supp. 64, 67-68 (D. Kan. 1975); *Limuel* v. *Southern Union Gas Co.*, 378 F. Supp. 964, 966-67 (W.D. Tex. 1974); *Bronson* v. *Consolidated Edison Co.*, 350 F. Supp. 443, 447 (S.D.N.Y. 1972); *Stanford, supra*, 346 F. Supp. at 721; *Davis* v. *Weir*, 328 F. Supp. 317, 321 (N.D. Ga. 1971). See *Salisbury* v. *Southern New England Tel. Co.*, 365 F. Supp. 1023 (D. Conn. 1973) (continued telephone service "assume[d to be] . . . cognizable right within the due process clause"). But see *Jackson* v. *Metropolitan Edison Co.*, 483 F.2d 754, 759-62 (3rd Cir. 1973), *aff'd on other grounds*, 419 U.S. 345, 95 S. Ct. 449, 42 L.Ed.2d 477 (1974).

Having "determined that due process applies, the question remains what process is due." *Goss*, *supra*, 95 S. Ct. at 738, quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

Though "[d]ue process is, perhaps, the least frozen concept of our law," *Palmer*, *supra*, 479 F.2d at 153, quoting *Griffin* v. *Illinois*, 351 U.S. 12, 20-21, 76 S. Ct. 585, 591, 100 L.Ed. 891 (1956), and defies "any concept of inflexible procedures universally applicable," *Goss*, *supra*,, 95 S. Ct. at 738, quoting *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961), *Palmer* has established that certain utility termination procedures fail to afford constitutional due process. See also *Limuel*, *supra*, 378 F. Supp. at 969; *Bronson*, *supra*, 350 F. Supp. at 448-50. "As a minimum," *Palmer* requires, notice and opportunity to be heard "in a meaningful time and in a meaningful manner." *Palmer*, *supra*, 479, F.2d at 165-66.

Notice. Constitutionally sufficient "shut-off" notice . . . [must] provide the customer with the information he needs to quickly and intelligently take available steps to prevent the threatened termination of service." 479 F.2d

at 166. Yet the MLG&W "final notice"[4] no better informs customers, like the Crafts, who dispute the underlying liability than the constitutionally deficient notice in *Palmer*. Like the Columbia Gas notice, therein, the MLG&W notice fails to mention "that a dispute concerning the amount due might be resolved through discussion with representatives of the company." Nor did the notice, at least prior to the opinion of the district court, inform the customer that "[c]redit [c]ounselors are available to clear up any questions, [to] discuss dis-

[4]

MEMPHIS LIGHT, GAS & WATER DIV.
FINAL NOTICE
THIS BILL IS NOW PAYABLE ONLY IN MAIN OFFICE
220 SOUTH MAIN OR AT MILLINGTON OFFICE

MEMPHIS LIGHT, GAS & WATER DIV.
P.O. BOX 388, MEMPHIS, TENN. 38145
PHONE 523-0711
INFORMATION CENTER

C-74-F6
EXHIBIT
7

LAST DAY TO PAY	ACCOUNT NUMBER	AMOUNT DUE

IF NOT PAID BY 5 P.M. THIS DATE
SERVICE WILL BE DISCONNECTED.

ACCORDING TO OUR RECORDS YOUR SERVICE BILL IS OVERDUE FOR PAYMENT. IF NOT PAID BY 5 P.M. ON THE DATE INDICATED, IT WILL BE NECESSARY TO TERMINATE THE SERVICE. AN ADDITIONAL CHARGE WILL BE MADE FOR DISCONNECTION.

IF PAID, PLEASE DISREGARD THIS NOTICE.

EXHIBIT

LAST DAY TO PAY	ACCOUNT NUMBER	AMOUNT DUE

IF NOT PAID BY 5 P.M. THIS DATE
SERVICE WILL BE DISCONNECTED.

FINAL NOTICE

RETURN THIS
STUB WITH PAYMENT

Enclosed with the "final notice is at least one of two "flyers." One flyer, mailed to approximately forty percent (40%) of MLG&W's customers, provides no better notice of dispute settlement possibilities than the "final notice."

"IMPORTANT NOTICE

"If you are having difficulty paying your utility bill, bring your bill to our neighborhood credit counselors for assistance. Your utility bills may be paid here also. (No phone calls accepted at neighborhood locations.)

"Place . . . .

"Time . . . .

"You can also receive credit help at the main office at 220 S. Main from 8:30 to 5 p.m. Monday through Friday.

"Phone: 523-0711."

puted bills or to make any needed adjustments."[5] See Marshall, J., dissenting in *Jackson, supra*, 95 S. Ct. at 464-65. Like the Columbia Gas notice, the MLG&W notice only warns the customer to pay or face termination. See *Davis* v. *Weir*, 359 F. Supp. 1023, 1026 (N.D. Ga. 1973); *Bronson, supra*, 350 F. Supp. at 450. That the MLG&W employee, who would physically terminate the services, was instructed to "attempt" a personal contact with the customer by knocking on the door immediately prior to termination is, of course, no notice to those customers absent from their residences.[6] Moreover, even if

Another flyer gives the customer notice of some dispute settlement possibilities.

> "If you are having difficulty paying your utility bill and would like to discuss a utility payment plan, *or if there is any dispute concerning the amount due,* bring your bill to the office at 220 South Main, Monday through Friday, or phone 527-0311 (sic)."

The testimony of MLG&W's secretary-treasurer, however, indicates that the latter flyer goes into "all bills, all final notices except those going to those specific areas that are accommodated by the community, credit counseling stations." Appendix 188. In sum, then, there is no assurance that the Crafts were mailed the just mentioned flyer.

[5] Though finding no due process denial, the district court "suggest[ed]" that appellees implement a notice "provid[ing] more specific information about customer service locations and personnel available to work out extended payment plans or adjustments of accounts in genuine hardships or appropriate situations." Appellees' counsel has appended to his brief a copy of the "new" notice, adopted pursuant to the district court's suggestion.

> "If you are having difficulty paying your utility bill due to genuine hardship and would like to work out a mutually satisfactory agreement for payment, the Memphis Light, Gas and Water Division has experienced and trained Credit Counselors available. There are supervisors and other management personnel available if you are not satisfied with the answers or solutions given by the Credit Counselors."

Of course, we imply no view as to the constitutional sufficiency of that notice.

[6] Mrs. Craft testified that she received no such personal notice, and the MLG&W secretary-treasurer left open the possibility of no personal contact being made nearly one-half the time. Appendix 313-14.

a contact were made, the employee was instructed to terminate unless there was a "hardship," illness, or "payment [were] in the mail," rather than informing the customer of his alternatives, the notice of which *Palmer* requires.

The MLG&W "final notice," however, is constitutionally sufficient for a customer like Parks, who asserts an inability to pay an admitted liability. The customer "having difficulty paying [the] utility bill" is instructed to "bring [the] bill to [certain] neighborhood credit counselors for assistance" and-or to the MLG&W offices "to discuss a utility payment plan." See footnote 4, *supra.*

Hearing. Constitutionally sufficient hearing procedures cannot depend solely on "unsupported assumption[s] of corporate good faith." *Palmer, supra,* 479 F.2d at 168. Like Columbia Gas, MLG&W has "no established procedures for resolution of disputes." Indeed, the MLG&W secretary-treasurer at first refused to acknowledge that there could be a bona fide dispute as to a customer's liability for consumed utilities.[7] That MLG&W, unlike Columbia Gas, had established "procedure[s] for negotiation of partial payment of delinquent accounts in lieu of termination,"[8] of course, provides no avenue for customers who, instead of claiming

[7] The secretary-treasurer later acknowledged that there could be a dispute if MLG&W were attempting to bill a "customer" because of his presence and use of utilities at certain premises, rather than having those utilities listed in his name, when the customer claimed he "didn't live there." Appendix 268-273. He also admitted that disputes could arise from gas and plumbing "leaks." Appendix 278-79. See *Limuel* v. *Southern Union Gas Co.*, 378 F. Supp. 964 (W.D. Tex. 1974); *Davis* v. *Weir,* 328 F. Supp. 317 (N.D. Ga. 1971).

[8] Unlike the undefined, or at best ill-defined, dispute settlement mechanisms, MLG&W had a rather well-defined, and well-publicized, "extended payment plan," permitting the partial payment of certain delinquent accounts to forestall utilities termination. See, e.g., Appendix 45-58.

an inability to pay in full an admitted utilities liability (Parks), dispute the existence of the liability (Crafts). See footnote 1, *supra*.

EQUAL PROTECTION

Appellant Holmes claims that MLG&W's refusal to initiate service to her at 730 Chelsea Avenue, Memphis, because of an outstanding utility bill at 730 Chelsea violated her Fourteenth Amendment right to equal protection. Neither Holmes nor MLG&W disputes the district court findings that utilities services at 730 Chelsea was in the name of one Sylvester Wade beginning July 17, 1973, and that Holmes lived with Wade at 730 Chelsea until August, 1973. When Holmes applied for utilities service in her name upon returning to 730 Chelsea in December, 1973, MLG&W refused her application because of $245 in unpaid utilities bills at 730 Chelsea. The district court, however, found that Holmes was responsible for only $170 in unpaid utilities bills, the district court viewing her as being responsible for services supplied during her presence at 730 Chelsea but not responsible for services supplied in another's name in her absence. MLG&W refused Holmes' offer to pay one-half of the outstanding bill and refused to turn on her utilities until she paid the outstanding bill in full. Appellees cite *Siegl* v. *Minneapolis Gas Co.*, 271 Minn. 127, 135 N.W.2d 60, 63 (1965), but *Siegl* is factually inapposite because there is no evidence that Wade remained present at 730 Chelsea after December, 1973, so that by applying in Holmes' name Wade could "obtain indirectly the very thing the utility was privileged to deny him directly." Indeed, Holmes uncontradictedly testified that Wade moved out, pursuant to agreement,

prior to her return to 730 Chelsea. We view *Davis* v. *Weir*, 497 F.2d 139, 144-45 (5th Cir. 1974), which rejected a similar policy of the City of Atlanta Water Works as being more factually on-point.

> "[T]he Department's discriminatory rejection of new applications for water service based on the financial obligations of third parties fails to pass muster under the traditional 'rational basis' analysis . . . . [Plaintiffs'] complaint is that the Water Works has divided those who *apply* for its services into two categories: applicants whose contemplated service address is encumbered with a pre-existing debt (for which they are not liable) and applicants whose residence lacks the stigma of such charges . . . . The Water Works urges that the practice of rejecting water service applications until all accrued debts at the premises have been extinguished facilitates collection of unpaid bills at multi-unit dwellings . . . . [But a collection scheme] that divorces itself entirely from the reality of legal accountability for the debt involved, is devoid of logical relation to the collection of unpaid water bills from the defaulting debtor. The City has no valid governmental interest in securing revenue from innocent applicants who are forced to honor the obligations of another or face constructive eviction from their homes for the lack of an essential to existence — water."

We accept *Weir*, and consequently hold that MLG&W unconstitutionally refused to install services in Holmes' name.

Refusal to certify class affirmed; holding of due process compliance with Crafts reversed; holding of due

process compliance with Parks affiirmed; holding of no equal protection violation against Holmes reversed; and remanded. The parties will bear their own costs of this appeal and no costs are taxed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

WILLIE S. CRAFT, et al,
Plaintiffs,

vs.

NO. C-74-86

MEMPHIS LIGHT, GAS & WATER DIVISION, et at,
Defendants.

MEMORANDUM OPINION

I

The plaintiffs, customers of Memphis Light, Gas and Water Division (hereinafter called MLG&W), brought this suit on their own behalf and on behalf of all others similarly situated for injunctive, declaratory and money damage relief, alleging that the defendants had caused to be terminated or had terminated the utility service of the plaintiffs under color of state law in violati of the plaintiff's constitutional right to due process of law under the Fourteenth Amendment to the United States Constitution.

The Defendant, MLG&W, is a large utility distributor of services and owned by the City of Memphis, Tennessee, as provided by Tennessee Private Acts of 1939, Chapter 381 (as amended). It is directed by a board of commissioners appointed by the City Council of Memphis, Tennessee, and is thus under the ultimate control of the government of the City of Memphis, though operated as a separate division. The individual defendants

are the president and general manager, the vice president, and the members of the board of commissioners of MLG&W, as well as two employees of MLG&W who have had responsibility for terminating customer's utility services as well as a class of others standing in the same position.

The named plaintiffs, Willie S. Craft and Mary Craft, husband and wife; Ms. Ida Bell Holmes; Ms. Annie Sue Funzie; Ms. Sarah Parks are or have been customers of the MLG&W.

II

MLG&W has approximately 235,879 residential consumers of electricity, 201,806 residential consumers of gas and 165,257 residential consumers of water. The steps in providing and terminating service to customers utilized by the MLG&W are as follows:

1. Service is connected upon request by telephone through the Information Center, or in person.

2. If meter reading date falls within five days after connection of service, no bill will be rendered. The first billing, therefore, will be for consumption over a period of from 6 to 35 days.

3. Approximately four days after meter reading date, a bill is mailed to service address or to any address designated by customer.

4. As indicated on the bill, the last day to pay net amount would be approximately 20 days after meter reading date.

5. Approximately 24 days after the meters are read, a final notice is mailed stating that services will be disconnected within approximately four days if no payment is received or some provision made for payment of the outstanding balance. Final notice however is not mailed if a customer owes less than $26.00 or MLG&W holds a deposit as much as twice the outstanding balance. A "flyer" is included with the final notice requesting the customer to contact Credit and Collections Department if he is having difficulty paying the bill, and also announcing an appropriate neighborhood location for credit assistance.

6. As indicated on the final notice, one service (electric) will be terminated by the meter reader. Cut-off of service will not usually be effected if in response to the meter reader's oral communication before cut-off the customer states that payment is in the mail or shows a paid receipt, or there is illness. If customer is not contacted, the meter reader or the person terminating service is instructed to leave a cul-off notice giving information about restoration of service. A customer may avail himself of an extended payment plan to answer or contact the Division requesting an extension of time in which to pay the asserted bill.

7. Approximately five days after the one electric service cut-off, the remaining services (gas and water) will be terminated if the customer has not paid the bill or made other arrangements for payment such as, for example, employing the extended payment plan.

8. If a customer has not contacted the Division within approximately 10 days after all services are terminated, a customer serviceman is requested to verify that all

services are still off. If a customer serviceman finds an unauthorized reconnection of services, the services will again be cut-off.

9. After an additional 20 days from previous verification, if the meter reader on his regular scheduled meter reading route finds a second unauthorized reconnection, an order is issued for the removal of meters.

III

The extended payment plan was put into effect by the MLG&W on or about March 1, 1973, to prevent utility disconnection of customers who show financial hardship. A customer who is in temporary financial difficulty may be permitted to make a partial payment on his utility bill and postpone payment of the remaining portion without discontinuance of utility services. Basically the plan allows for one-half (1/2) payment of a past due bill with the balance being extended in equal payments on three subsequent bills. Each such account, however, is handled on an individual basis with an initial payment sometimes varied and as much as twelve months being allowed for payment of the balance in extreme hardship cases. A customer claiming a hardship that would cause his utilities to be in jeopardy may apply by contacting the Credit Department of MLG&W. This plan was publicized at the time it was put into effect.

Each of the plaintiffs is participating in or has participated in the extended payment plan. In 1973, the vast majority of customers requesting extensions for payment obtained an extension.

IV

Credit counselors assist customers who have difficulty

with payments or disputes concerning their bills with MLG&W. If those counselors cannot satisfy the customer, then the customer is referred to management personnel; generally the chief clerk in the department; then the supervisor in credit and collection. In addition, a dissatisfied customer may appeal to the Board of Commissioners of MLG&W as to complaints regarding bills, service, termination of service or any other matter relating to the operation of the Division. A customer may, if he so desires, be accompanied by an appropriate representative. The billing of customers, the determination as to when a final notice is sent, and the termination of service is governed by policies, rules and regulations adopted and approved by the Board of Commissioners of MLG&W.

V

Mr. and Mrs. Willie S. Craft have lived in a dwelling at 1019 Alaska in Memphis, Tennessee, since October, 1972, which they have used as a one family dwelling, although more than 10 persons have resided there. From October, 1972 until July, 1973, they encountered no difficulty with the defendant, MLG&W. They received utilities on MLG&W account number 02-012-18-660-2 for this period of time and their payments on this account remained current. At the time they moved into the premises, the Crafts noticed that there were two separate gas and electric meters outside the house. The seller of the residence told the Crafts not to concern themselves with the meter situation and they relied on his representation. The residence had in fact previously been used as a duplex and the Crafts noticed upon moving in that there was evidence of two apartments or living areas in the house, as there was evidence of an-

other kitchen in the house. There was, however, only one water meter serving the premises and the Crafts paid no water bill from October 9, 1972 until January 5, 1973.

In 1973, Mr. and Mrs. Craft received two bills; their regular bill, and a second bill with an account number 02-012-18-662-4 in the name of Willie C. Craft. The Crafts received a separate bill for each meter and city service fee[1] on each bill. The meters were combined to one gas and one electric meter in October, 1973, by a private plumber and electrical contractor, as ordered and paid by the Crafts. The Crafts did not, however, receive a single bill (instead of two) until January, 1974, because of problems attendant to the combination of meters by the Crafts' contractor. The Crafts began participation in the extended payment plan in November, 1973.

After the appearance of this second billing covering 1019 Alaska, Mrs. Craft made several trips to the offices of the defendant to try to straighten out the matter, for which she had to take time off from work. On five different occasions the utilities of Mr. and Mrs. Craft were terminated. Each time the MLG&W sent final notices but did not personally contact the Crafts or others at the residence prior to disconnecting service. During one of those terminations of water, the Craft family was without water from MLG&W during the summer for about one week. On one occasion when Mrs. Craft was attempting to avert a utilities termination, after final notice, she called the defendant's offices and explained that she had paid a bill, but was given no satisfaction. The procedure for an opportunity to talk with management was

[1] The city service fee is a separate item on the regular utility bill as specified by the City of Memphis Code 19-14.

not adequately explained to Mrs. Craft, although she repeatedly tried to get some explanation for the problems of two bills and possible duplicate charges.

All during the time of these disputes Mr. and Mrs. Craft made good faith efforts to pay for their utilities as well as to straighten out the problem. Of the balance claimed by MLG&W in March, 1974, some involved possible gas overcharges and double or duplicate billings with respect to city service fees.

VI

Mrs. Ida Bell Holmes' dispute with MLG&W involved her attempt to move back to her house at 730 Chelsea Avenue, Memphis, Tennessee,[2] and the defendant's refusal to initiate utility services to her until she paid an outstanding utility bill at that address in the amount of $245.56. Mrs. Holmes had formerly lived at 730 Chelsea with Mr. Sylvester Wade for several years. The utility service at that address had, at one time during 1972, been placed in the name of Mrs. Holmes' son, Jessie Lee Holmes;[3] the utility service was placed in the name Sylvester Wade beginning July 17, 1973. During August of 1973, Mrs. Holmes left Mr. Wade and moved to her sister's residence in Memphis. At the time she moved, she claimed that the outstanding utility bill was $42.76 including $25.00 for the deposit due when service was connected in the name of Sylvester Wade.

Mrs. Holmes subsequently moved to an address at 796 Love Alley during October of 1973, and utilities were

[2] Sylvester Wade and Ida Bell Holmes purchased the property at 730 Chelsea Avenue in March of 1972.

[3] When service was terminated in the name of Jessie Lee Holmes in June, 1973, there was a delinquent balance of $144.29.

connected in her name at that address on that date. She paid her regular monthly utility bills and had no problems with the defendants concerning her bills at that address. However, when she attempted to move back to the address at 730 Chelsea, the defendants refused to turn on her utility services until she paid the outstanding bill, including the amount due from the time she and her family had previously occupied this residence.

Mrs. Holmes was responsible for at least a substantial part of this bill, but she was not responsible for all of it due to Sylvester Wade's default. At the time she moved from 730 Chelsea she owed a utility bill to the defendants for actual usage. Subsequent to her move, a bill of $144.29 was sent to 730 Chelsea which was the final bill on the account in the name of her son, Jessie Lee Holmes. A total of these two accounts, approximately $170.00 to $175.00 was the part for which Mrs. Holmes should have been held responsible.

MLG&W attempted to charge the full amount of outstanding bill left by Sylvester Wade, or $245.56, to Mrs. Holmes before they would initiate service to her. Mrs. Holmes offered to pay one-half of the outstanding bill, but this offer was refused by the defendants.

As a result of the defendants' actions, Mrs. Holmes delayed moving back into her home until 1974, after the present suit was filed.

VII

Mrs. Sara Parks moved into a house at 1192 Coker Street, Memphis, Tennessee, sometime about September or October, 1972. Mrs. Parks did not receive her first billing from the MLG&W until late February or early March, 1973. The first bill received was in the amount

of $280.34, representing all the charges up until that time. Mrs. Parks made some attempt to make small partial payments, and MLG&W deferred part of the outstanding amount of the bill. Mrs. Parks was never able to pay the full bill due to her limited income. Consequently her utility services were terminated on July 1, 1973. Mrs. Parks later moved to another address and had utility services instituted in the name of her son. She received regular monthly billings at this address and has kept her bill current. The problem that Mrs. Parks has had with the defendants has not been a dispute concerning the amount of her bill, but has been difficulty in paying her bill due to not being billed for several months.

Although the defendants have some extended payment plans for assisting customers such as Mrs. Parks in hardship situations, these plans generally allow for the extension of only one half of the outstanding bill. Mrs. Parks lived at 1192 Coker for approximately 10 months and paid only $50.00 to MLG&W for utility services during that period of time. Mrs. Parks has paid nothing on the delinquent bill and a lawsuit was filed by the Division against Mrs. Parks for it.

VIII

Mrs. Annie Sue Funzie did not appear to testify at the trial of this cause. Mrs. Funzie has had her utility services terminated by MLG&W at least two times and each time service was reconnected by others than employees of the Division and without the knowledge and approval of the Division or without payment of her delinquent account. Service to 968 Leath for Mrs. Funzie was connected on September 21, 1973, and she moved from that address on March 13, 1974, owing $161.26. Mrs. Funzie

admits in her complaint that she received final notice from the Division in December, 1973, when living at 968 Leath. Mrs. Funzie was granted an extension at her request on December 26, 1973, while living at 968 Leath. Mrs. Funzie moved to 1091 Leath and service was instituted on March 13, 1974. Mrs. Funzie paid nothing at the 1091 Leath address.

IX

The Court concludes that if a right of action in this forum and jurisdiction is properly established, only the Crafts have actually established any damages or asserted any real basis for a cause of action by reason of MLG&W actions. There has been demonstrated no willful or intentional violation of plaintiff's claimed rights under due process by defendant in any event. Plaintiffs have sued as representatives of a class of all persons claiming to have a dispute with MLG&W about their utility bills, resulting in termination where full payment of the MLG&W bill has not been made. We conclude that this is not a proper case for class action (as to damages), however, except to the extent of declaratory judgment or other relief granted which may accrue to the benefit of others similarly situated to the Crafts. The question of fact common to members of the class on the question of damages, particularly, and also with respect to circumstances of a purported dispute over charges would predominate as to individuals rather than all members of the alleged class. The Court is not convinced that claims of the representative parties are typical of claims that may be made by the purported class with regard to various and myriad situations or circumstances pertaining to due process violations, if any.

X

First, however, it must be determined whether jurisdiction lies against defendant under 42 U.S.C. §1983 wherein plaintiffs assert a violation of lawful rights "under color of state law."[4] Under the rationale of City of Kenosha v. Bruno, 412 U.S. 507, 41 U.S.L.W. 4819 (1973), a municipality or governmental unit standing in that capacity is not a "person" within the meaning of this post-civil war statute. MLG&W is not a "person" within the meaning of this statute as to equitable relief sought or as to damages sought under 42 U.S.C. §1983. Plaintiffs have also sued individual commissioners, offcials and employees of MLG&W.

XI

Plaintiffs have also sued for equitable and other relief under the Fourteenth Amendment for alleged violation of their due process rights. They cite *Akron Board of Education v. State Board*, 490 F.2d 1285 (6th Cir. 1974) in which it was stated in the majority opinion that "injunctive relief may be had to restrain members of a Board of Education . . . from violating the Fourteenth Amendment." 490 F.2d 1292[5] (claiming jurisdiction under 28 U.S.C. §1343(3) and (4).

We consider then whether plaintiffs have established that the procedure here involved in resolution of utility

[4] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, priveleges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[5] It was noted that the decision applied to "the unique facts of this case." 490 F.2d 1291.

payments and termination of services in event of non-payment violates due process.

First of all, it is clear that Tennessee state law sanctions termination of service of utilities such as water for non-payment. *Patterson v. City of Chattanooga*, 192 Tenn. 269, 241 S.W.2d 291 (1951). See also *Jones v. Nashville*, 109 Tenn. 550, 72 S.W. 985 (1902). This question was also considered in *Jackson v. Metropolitan Edison*, 483 F.2d 754 (3rd Cir. 1973). Like that court, "we do not believe there is a property right to be furnished utility service without payment."[6] *Jackson v. Metropolitan Edison Co., supra*, holds squarely that "a right to receive utility service pending resolution of a dispute between a customer and the company is [not] protected by the Constitution of the United States." 483 F.2d 762. This holding is now before the United States Supreme Court for resolution and determination. Plaintiffs, on the other hand, rely upon *Palmer v. Columbia Gas*, 479 F.2d 153 (6th Cir. 1973), holding under the circumstances of that case a violation of due process in a private utility's termination of services to its customers. The factors relied upon heavily in the *Palmer* case, not present in the MLG&W procedures, were:

1. serious discrepancy between estimated bills and bills based upon actual readings;

2. no usual contact with the customer by the "cut-off" personnel; no door knocker notice;

3. often "significant and tragic" notice mistakes made by the utility company;

[6] 483 F.2d 761, f.n. 14.

4. uncritical reliance by local personnel on a computer "located in a distant city"; (479 F.2d 158).

5. no mailed termination notice "flyer" with regard to termination procedure;

6. frequent mistaker sending of shut-off notices despite agreements for extended payment;

7. "a rather shockingly callous and impersonal attitude upon the part of defendant."

It was also stated in that case that "the question of what constitutes due process of law can only be answered in relation to the circumstances of each particular case." *Palmer, supra*, p. 165. The circumstances here present indicate minimal notice of proposed action and a minimum opportunity to be heard. Significantly here also MLG&W has established a procedure for negotiation of partial payment of delinquent accounts in lieu of immediate termination, something not accomplished by Columbia Gas of Ohio in the *Palmer* case. To be sure, MLG&W sent out many final notices warning of prospective termination that did not result in actual cessation, but usually this triggered an opportunity for extended payments where circumstances so indicated.

None of the individual plaintiffs were deprived of due process opportunity to be heard, nor did the circumstances indicate any substantial deprivation except in the possible instance of Mr. and Mrs. Craft. *Ihrke v. Northern States Power*, 459 F.2d 566 (8th Cir. 1972) vacated as moot 409 U.S. 815, in similar circumstances, also held that an action of this kind was not properly considered as a class action on behalf of all persons who had made application for service.

The individually named defendants in this case are not immune from suit under the civil rights statute involved, but are entitled to a qualified immunity only based upon exercise of good faith. They would be individually liable only for wrong or harm intentionally or subjectively inflicted upon plaintiffs. *Ka-Haar, Inc. v. Huck, et al*, 345 F.Supp. 54 (E.D. Wis. 1972); *Nelson v. Knox*, 256 F.2d 312 (6th Cir. 1958); *Cobb v. City of Malden*, 202 F.2d 701 (1st Cir. 1953); *O'Brien v. Galloway*, 362 F.Supp. 901 (D.C. Del. 1973). Liability asserted and shown, by the Crafts only, and at most, could be based upon some negligence or oversight on the part of defendants in their carrying out of their official duties, not any conscious and deliberate participatory act by defendants.

There is also the question as to whether judgment for damages, if any, were awarded against the individual defendants would be payable out of the public treasury and therefore subject to Eleventh Amendment immunity. *O'Brien v. Galloway, supra; Samuel v. Univ. of Pittsburgh*, 375 F.Supp. 119 (E.D. Pa. 1974); *Ford Motor Co. v. Indiana*, 323 U.S. 459 (1945); *Jordan v. Gilligan*, ... F.2d ..... (No. 73-1973, 6th Cir. 1974).

As a matter of simple equity, whether on the principles of pendant jurisdiction, or on the basis of a very limited possible denial of due process to Mr. and Mrs. Craft *only*, this Court does hope that MLG&W may issue credit to Mr. and Mrs. Craft in the amount of $35.00, representing duplicate and unnecessary charges made and expenses incurred by Mr. and Mrs. Craft with respect to terminations which should have been unnecessary had effectual relief been afforded them as requested.

Furthermore, this Court suggests, though it does not

necessarily require, that MLG&W in the future send a certified or registered mail notice of termination at least four days prior to termination, the reasonable cost for which may be added to that customer's account by MLG&W, to a prospective customer to be cut off. Furthermore, such notice of termination should provide more specific information about customer service locations and personnel available to work out extended payment plans or adjustments of accounts in genuine hardships or appropriate situations.

In view of the limited possible relief indicated in this case at this time, (without prejudice to any future showing of a want of due process under other circumstances) the Court presently awards no attorney's fee to plaintiff's counsel, a representative of Memphis & Shelby County Legal Services Association, but will assess costs against the defendant.

The cause will be retained for 30 days for proposed forms of notification herein suggested and an opportunity for the parties affected to submit information and memoranda relative to its necessity, feasibility and/or desirability in light of the Court's findings and conclusions herein set forth. Also, the parties may submit memoranda with respect to whether and if so, to what extent, attorney's fees would or should be allowable, if at all.

This ..... day of November, 1974.

Harry W. Wellford

UNITED STATES
DISTRICT COURT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISON**

WILLIE S. CRAFT, et al,
Plaintiffs,

vs. NO. C-74-86

MEMPHIS LIGHT, GAS &
WATER DIVISION, et al,
Defendants.

ORDER

In a memorandum opinion dated November 26, 1974, the Court found that, contrary to plaintiffs' contentions, no cause of action was stated against defendant Memphis Light, Gas & Water Division under 42 U.S.C. §1983, and that defendants had not violated plaintiffs' due process rights under the facts and circumstances of this case. The Court relied upon *Jackson v. Metropolitan Edison Co.*[1] in this holding, which has now been affirmed by the United States Supreme Court. ..... U.S. ..... (12-23-74) 43 L.W. 1097, 4110. At the same time, the Court distinguished the procedures being utilized by defendants in this case from those employed in *Palmer v. Columbia Gas*, 479 F.2d 153 (6th Cir. 1973). The Court did, however, suggest certain amendments and changes to improve the procedures used in terminating utility service for non-payment and with respect to negotiating disputes and difficulties about the outstanding amount of bills.

Even though no legal cause of action was proven for the reasons given, the Court also suggests that defend-

[1] 483 F.2d 754 (3rd Cir. 1974).

ants issue a credit to Mr. and Mrs. Craft, and this has been done. Additionally, defendants have instituted some new procedures which will give more definitive and adequate notice to customers of possible or impending cut-off of services.

Under the circumstances, plaintiffs' counsel is not entitled to an award of attorney fees. Defendants have not been guilty of any deliberate wrongdoing in denying plaintiffs their constitutional or lawful rights so as to justify an assessment punitive in nature. There is no common fund or substantial benefit to a class achieved by plaintiffs' counsel.

The cause is now dismissed and costs are assessed against defendants.

This ..... day of December, 1974.

Harry W. Wellford

UNITED STATES
DISTRICT COURT JUDGE

APPENDIX C

AMENDMENT 14

§ *1. Citizenship—Due process of law—Equal protection.*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 683. Rules and regulations of commissioners.

Said board of light, gas and water commissioners shall have the power and authority to promulgate and enforce such rules and regulations governing the distribution of light, power, gas and water, as they may deem proper in the operation of said light, gas and water division. (Priv. Acts 1939, ch. 381, § 8)

Sec. 691. Disposition of revenue of light division.

The revenue received each year from the operation of the light division, before being used for any other purpose, shall be used for the following purposes, in the order named, to-wit:

(1) The payment of all operating expenses of the light division for the year.

(2) For interest accruals and sinking fund accruals on bonds and mortgages issued for the benefit of the light division.

(3) For cash payments to a working capital reserve, a renewals and replacement reserve, and a casualties reserve, for the benefit of the light division, said cash payments to said reserves to be in such amounts as the light, gas and water commissioner think proper and by resolution elect to set up from time to time.

(4) For payment to the general funds of the municipality a sum equal in amount to what would be the city taxes on the properties of the light division within the city limits of the City of Memphis if said properties were privately owned.

(5) For payment to a reasonable surplus account which may be used by the board of light, gas and water commissioners for extensions and improvements to the light plant or system and/or for the purchase of outstanding bonds that may have been issued for the benefit of the light division, as the board of light, gas and water commissioners may deem advisable.

(6) For payment to the general funds of the municipality a sum not to exceed a cumulative return of six per cent (6%) per annum of the equity or investment, if any, of the municipality in the properties of the light division, the said percentage to be fixed by resolution of the board of commissioners of the City of Memphis. Should the said percentage as fixed by the board of commissioners of the City of Memphis exceed a reasonable figure in the opinion of the board of light, gas and water commissioners, the amount to be paid by the board of light, gas and water com-

missioners to the board of commissioners of City of Memphis shall be determined by a board of arbitration, consisting of one member of the board of city commissioners and one member of the board of light, gas and water commissioners, who shall elect a third member, and the findings of this board of arbitration shall be final and binding on both the board of city commissioners and the board of light, gas and water commissioners.

Provided that in no event shall the aforesaid payment to the municipality for any year exceed one-half of the net profits realized by the light division during that year, unless the board of light, gas and water commissioners shall, by resolution, consent thereto.

(7) Any surplus then remaining, over and above safe operating margins, shall be devoted solely to rate reduction.

It is further provided that said allotment of funds may be changed in such manner as may be deemed necessary by the board of light, gas and water commissioners in contracting with the Tennessee Valley Authority for the purchase of power, or as may be deemed necessary by the board of commissioners of the City of Memphis, with the approval of the board of light, gas and water commissioners, in the issuance and sale of any bonds or notes on behalf of the electric system, or on behalf of the electric system in conjunction with the gas or water systems. (Priv. Acts 1939, ch. 381, § 19)

Sec. 692. Disposition of revenue of water division.

The revenue received each year from the operation of the water division, before being used for any other purpose, shall be used for the following purposes, in the order named, to-wit:

(1) For the payment of all operating expenses of the water division for the year.

(2) For interest accruals and sinking fund accruals on bonds or mortgages issued for the benefit of the water division.

(3) For cash payments to a working capital reserve, a renewals and replacement reserve, and a casualties reserve, for the benefit of the water division. Said cash payments to said reserves to be in such amounts as the light, gas and water commissioners think proper and by resolution elect to set up from time to time.

(4) For the payment to the general funds of the municipality a sum not to exceed a cumulative return of three per cent (3%) per annum of the equity or investment, if any, of the municipality in the properties of the water division, the said percentage to be fixed by resolution of the board of commissioners of the City of Memphis. Should the said percentage as fixed by the board of commissioners of the City of Memphis exceed a reasonable figure in the opinion of the board of light, gas and water commissioners, the amount to be paid by the board of light, gas and water commissioners to the board of commissioners of the City of Memphis shall be determined by a board of arbitration, consisting of one member of the board of city commissioners and one member of the board of light, gas and water commissioners,

who shall select a third member, and the findings of this board of arbitration shall be final and binding on both the board of city commissioners and the board of light, gas and water commissioners.

(5) Any surplus thereafter remaining shall be retained by the board of light, gas and water commissioners and may be used by them for expansion and enlargement of the water division and/or purchase of bonds that may have been issued and outstanding for the benefit of said division.

(6) Any surplus thereafter remaining over and above safe operating margins, shall be devoted to rate reduction.

It is further provided that said allotment of funds may be changed in such manner as may be deemed necessary by the board of commissioners of the City of Memphis with the approval of the board of light, gas and water commissioners in the issuance and sale of any bonds or notes on behalf of the water system, or on behalf of the water system in conjunction with the gas or electric systems. (Priv. Acts 1939, ch. 381, § 20)

Sec. 693. Disposition of revenue of gas division.

The revenue received each year from the operation of the gas division, before being used for any other purpose, shall be used for the following purposes, in the order named, to-wit:

(1) For the payment of all operating expenses of the gas division for the year.

(2) For interest accruals and sinking fund accruals on bonds or mortgages issued for the benefit of the gas division.

(3) For cash payments to a working capital reserve, a renewals and replacements reserve, and a casualties reserve, for the benefit of the gas division. Said cash payments to said reserves to be in such amounts as the light, gas and water commissioners think proper and by resolution elect to set up from time to time.

(4) For payment to the general funds of the municipality a sum equal in amount to what would be the city taxes on the properties of the gas division within the city limits of the City of Memphis if said properties were privately owned.

(5) For payment to a reasonable surplus account which may be used by the board of light, gas and water commissioners for extensions and improvements to the gas plant or system and/or for the purpose of outstanding bonds that may have been issued for the benefit of the gas division, as the board of light, gas and water commissioners may deem advisable.

(6) For the payment to the general fund of the municipality a sum not to exceed a cumulative return of six per cent (6%) per annum of the equity or investment, if any, of the municipality in the properties of the gas division, the said percentage to be fixed by resolution of the board of commissioners of the City of Memphis. Should the said

percentage as fixed by the board of commissioners of the City of Memphis exceed a reasonable figure in the opinion of the board of light, gas and water commissioners, the amount to be paid by the board of light, gas and w a t e r commissioners to the board of commissioners of the City of Memphis shall be determined by a board of arbitration, consisting of one member of the board of city commissioners and one member of the board of light, gas and water commissioners who shall select a third member, and the findings of this board of arbitration shall be final and binding on both the board of city commissioners and the board of light, gas and water commissioners.

Provided that in no event shall the aforesaid payment to the municipality for any year exceed one-half of the net profits realized by the gas division during that year, unless the board of light, gas and water commissioners shall, by resolution, consent thereto.

(7) Any surplus thereafter remaining over and above safe operating margins, shall be devoted solely to rate reduction.

Is is futher provided that said allotment of funds may be changed in such manner as may be deemed necessary by the board of commissioners of the City of Memphis, with the approval of the board of light, gas and water commissioners, in the issuance and sale of any bonds or notes on behalf of the gas system, or on behalf of the gas system in conjunction with the electric or water systems. (Priv. Acts 1939, ch. 381, § 22; Priv. Acts 1945, ch. 18, § 1; Priv. Acts 1947, ch. 491, § 1; Priv. Acts 1959, ch. 224, § 1)

APPENDIX D

CHART NO. 2

STEPS FOLLOWED IN TERMINATING SERVICES NEW OR SLOW PAYING CUSTOMER

Jan. 2	Jan. 31	Feb. 6	Feb. 20	Feb. 25	Mar. 1	Mar. 7	Mar. 14	April 1	April 8
Request for Service	Meters Read	Bills Mailed	Last Day to Pay Net	Final Notice Mailed	Meters Read & 1 Serv. Cut-Off	All Serv. Cut-Off	Verified DCO	Meters Read	Occupant Letter
1	2	3	4	5	6	7	8	9	10

April 11	May 1	May 8	May 31	June 10
All Serv. Cut-Off	Meters Read	Second Occupant Cut-Off	Meters Read	Meters Removed
11	12	13	14	15

3. BILLED FOR CONSUMPTION AND $25.00 DEPOSIT.
6. ELECTRIC SERVICE (ONLY) CUT-OFF BY METER READER AFTER EFFORT TO CONTACT CUSTOMER.
7. BALANCE FROM BILL MAILED FEBRUARY 6, BROUGHT FORWARD.
8. IF NO CONTACT WITH MLGW BY CUSTOMER.
9. IF CONSUMPTION FOUND, PROCEED TO No. 10.
10. APPROXIMATELY 65 DAYS CONSUMPTION.

CHART NO. 4

ADDITIONAL INFORMATION AND METHODS USED IN WORKING WITH HARDSHIP CUSTOMERS

1. Delinquent (Final) Notices Mailed in 1973 202,000
2. One Service Cut-Offs Issued 47,000
3. One Service Cut-Offs Completed 22,000
4. All Service Cut-Offs (DCO) Issued 26,000
5. All Service Cut-Offs Completed (Est.) (62%) 16,000
6. Customer Contacts by Credit Department
   (A) Main Office 62,000
   (B) Neighborhood Counselling Locations 3,500
   (C) Telephone ..... Amount Undetermined
7. Extensions Granted (91%) 43,000
8. Budget Billing Offered.
9. Meter Readers' Attempt To Contact Customer on High Reading.
10. Gross Payment Reduced From 10% to 5% in 1973.
11. Two Discounts Allowed per Year in 1973.
12. Extensions of New Pay Date From 15 to 20 Days in 1973.
13. Investigation of High Bill Complaints (Cut-Off Procedures Delayed) 33,000
14. Economic Impact of Increased Bad Debt Expense is Greatest on Low or Fixed Income Customers.
15. Actual Bad Debt Expense:
    1970—$259,566
    1971— 285,222
    1972— 294,017
    1973— 498,030
    1974— 334,330 (First Six Months)

Supreme Court, U. S.
FILED
MAY 9 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-39

MEMPHIS LIGHT, GAS AND WATER DIVISION; CALVIN HENZE, HENRY T. WINKELMAN, ELIOT WHITTINGTON, ROBERT S. BOWERS and PATRICIA SHAW,
Petitioners,

v.

WILLIE S. CRAFT and MARY CRAFT, MS. IDA BELL HOLMES, MS. ANNA SUE FUNZIE, MS. SARA PARKS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 12, 1976

CERTIORARI GRANTED FEBRUARY 22, 1977

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-39

MEMPHIS LIGHT, GAS AND WATER DIVISION; CALVIN HENZE, HENRY T. WINKELMAN, ELIOT WHITTINGTON, ROBERT S. BOWERS and PATRICIA SHAW,
Petitioners,

v.

WILLIE S. CRAFT and MARY CRAFT, MS. IDA BELL HOLMES, MS. ANNA SUE FUNZIE, MS. SARA PARKS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Title Omitted in Printing)

RELEVANT DOCKET ENTRIES

Date	
1974	
Feb. 21	Complaint.
Feb. 21	Motion for class action and temporary restraining order and/or preliminary injunction.
Mar. 5	Motion to dismiss complaint.
Mar. 15	Plaintiffs first set of interrogatories to defendants.
Mar. 15	Response to motion to dismiss.
Mar. 15	Amended Complaint.
Mar. 22	Order stating that utilities of plaintiffs will be continued as long as current statements are paid and payment continues; motion to dismiss taken under advisement.
May 3	Answer to plaintiff's first set of interrogatories.
May 7	Answer to Amended Complaint.
May 20	Order allowing Amendment to Answer to include an additional exhibit which reflects the dates on which final notices were mailed to the plaintiffs herein according to the records of the Memphis Light, Gas and Water Division.

May 23 Amendment to Answer.

Aug. 19 Plaintiff's Second Set of Interrogatories to Defendants.

Sept. 12 Answer to Plaintiff's Second Set of Interrogatories.

Nov. 18 Memorandum Opinion.

Dec. 30 Order Dismissing Cause.

1975

Jan. 27 Notice of Appeal.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

No. 74-86

Willie S. Craft and Mary Craft, Husband and Wife,

Ms. Ida Bell Holmes,

Ms. Annie Sue Funzie,

Ms. Sarah Parks, on behalf of themselves and all others similarly situated,

Plaintiffs

vs.

Memphis Light, Gas and Water Division

Calvin Henze, President and General Manager, Memphis Light, Gas & Water Division, individually and in his official capacity,

Mr. Henry T. Winkelman, Vice-President and Commissioner of Memphis Light, Gas & Water Division, Individually and in his official capacity,

Mr. Eliot Whittington, Commissioner of Memphis Light, Gas & Water Division, individually and in his official capacity,

Mr. Robert S. Bowers, Commissioner of Memphis Light, Gas & Water Division, individually and in his official capacity,

Mrs. Patricia Shaw, Commissioner of Memphis Light, Gas & Water Division, individually and in her official capacity,

An Unknown Number of Unnamed Utilities Termination Personnel, individually and in their official capacities, on behalf of themselves and all others similarly situated,

Defendants

AMENDED COMPLAINT

(Filed March 15, 1974)

I

Preliminary Statement

The Plaintiffs, customers of Memphis Light, Gas & Water Division's utilities services bring this action on behalf of themselves and all others similarly situated for **injunctive, declaratory,** and **money** damage relief, because the defendants and the defendant class have caused to be terminated or have **terminated** their utilities services under **color** of state law in violation of plaintiffs' constitutional right to **due process** under the Fourteenth Amendment to the Constitution of the United States.

II

Jurisdiction

Plaintiff brings this action under 28 U.S.C. 1343(3)(4) and 42 U.S.C. 1983 which authorize original jurisdiction in the Federal District Courts for action to redress grievances for the deprivation of rights guaranteed to citizens of the United States under the Constitution. Plaintiffs also bring the action for Declaratory Judgment under 28 U.S.C. §§ 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure.

III

Plaintiffs

Mr. and Mrs. Willie S. Craft live at 1019 Alaska in Memphis, Tennessee and are citizens of the United States of America.

Ms. Ida Bell Holmes lives at 796 Love Alley in Memphis, Tennessee and is a citizen of the United States of America.

Ms. Annie Sue Funzie lives at 968 Leath in Memphis, Tennessee and is a citizen of the United States of America.

Ms. Sarah Parks lives at 1231 Firestone in Memphis, Tennessee and is citizen of the United States of America.

IV

Defendants

1. Memphis Light, Gas & Water Division is a large utility company, municipally owned by the City of Memphis, Tennessee. It is established under Tennessee Private Acts 1939 Chapter 381 and as amended. It is controlled by a Board of Commissioners appointed by the City Council of Memphis, Tennessee and is thus under the control of the government of the city of Memphis, which owns it.

2. Mr. Calvin Henze is the President of Memphis Light, Gas & Water Division and in such capacity is responsible for the making and implementation of the unconstitutional practices challenged, herein. Mr. Henze was appointed by the City Council of Memphis, Tennessee. He is sued, herein, individually and in his official capacity.

3. Mr. Henry T. Winkelman is the Vice-President and a Commissioner of Memphis Light, Gas & Water Division and in such capacity is responsible for the making and implementation of the unconstitutional practices challenged, herein. Mr. Winkelman was appointed by the City Council of Memphis, Tennessee. He is sued, herein, individually and in his official capacity.

4. Mr. Eliot Whittington is a Commissioner of Memphis Light, Gas & Water Division and in such capacity is responsible for the making and implementation of the unconstitutional practices challenged, herein. Mr. Whittington was appointed by the City Council of Memphis, Tennessee. He is sued, herein, individually and in his official capacity.

5. Mr. Robert S. Bowers is a Commissioner of Memphis Light, Gas & Water Division and in such capacity is responsible for the making and implementation of the unconstitutional practices challenged, herein. Mr. Bowers was appointed by the City Council of Memphis, Tennessee. He is sued, herein, individually and in his official capacity.

6. Mrs. Patricia Shaw is a Commissioner of Memphis Light, Gas & Water Division and in such capacity is responsible for the making and implementation of the unconstitutional practices challenged, herein. Mrs. Shaw was appointed by the City

Council of Memphis, Tennessee. She is sued, herein, individually and in her official capacity.

7. An Unknown Number of Unnamed Utilities Termination Personnel are employees of Memphis Light, Gas & Water Division who have terminated the utilities of plaintiffs Craft, Funzie, and Parks at various times. They are acting under the policies set by defendants Henze, Winkelman, Whittington, Bowers, and Shaw, and are the agents of said Commissioners for the purpose of implementing the unconstitutional policies challenged, herein. The number and names of these individuals are known only to the employees of the defendant Memphis Light, Gas & Water Division and defendants Henz, Winkelman, Whittington, Bowers, and Shaw. These unnamed utilities termination personnel are sued herein, individually and in their official capacities. The names of these defendants can only be known to the plaintiffs and to the Court through discovery in this cause.

They are also sued as representatives of a defendant class whose job it is to terminate utilities services of members of the plaintiff class.

V

Class Action

1. Plaintiffs Willie S. Craft, Mary Craft, Annie Sue Funzie, and Sarah Parks bring this action on their behalf, and pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure on behalf of all other persons similarly situated consist of all persons receiving utilities services from defendant, Memphis Light, Gas & Water Division who have had said utilities terminated without notice, a fair hearing at a meaningful time and in a meaningful manner, timely and adequate notice detailing the reasons for the desired termination, an opportunity to defend

by confronting adverse testimony, and to cross-examine same, to present testimony in their own behalf, a right to be represented by counsel, and all of this before an impartial hearing examiner, and other due process rights in deprivation of the Fourteenth Amendment to the Constitution of the United States.

2. Ida Bell Holmes brings this action in her own behalf, and pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated. The members of the class similarly situated consist of all persons in Memphis, Tennessee who are entitled to receive and to whom defendant Memphis Light, Gas & Water Division has a duty to supply utilities, who utilities have been denied to them without an opportunity for a fair hearing, at a meaningful time and in a meaningful manner, timely and adequate notice detailing the reasons for the refusal to supply utilities, an opportunity to defend by confronting the adverse testimony, an opportunity to present evidence and arguments in their own behalf, a right to cross-examination, a right to be represented by counsel, all of this before an impartial hearing examiner. The requirements of Rule 23 in both classes are met in that the class is so numerous that joinder of all members of the class is impracticable; there are questions of law and facts common to the class; the claims of the representative parties are typical of the claims of the class, and representative parties will fairly and adequately protect the interest of the class; and the party opposing the class has acted on grounds generally applicable to the class thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole. While Plaintiffs bring this action for money damages as well as injunctive relief, the non-monetary issues clearly predominate over the monetary issues.

3. The Unknown Number of Unnamed Utilities Termination Personnel are sued on behalf of themselves and all others similarly situated. The class consist of all those employees of Memphis Light, Gas & Water Division whose job it is to terminate

utilities services to residential customers of utilities. They are a proper defendant class in that this class is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, the defenses of the representative parties are typical of the defenses of the class, and the representative parties will fairly and adequately protect the interest of the class. Further, adjudications with respect to individual members of the defendant class would, as a practical matter, be dispositive of the interest of the other members of the defendant class and these utilities termination personnel have acted on grounds generally applicable to the defendants class, against members of the plaintiff class, whereby making appropriate final injunctive relief or declaratory relief with respect to this defendant class as a whole.

Statement of the Case

1. Named plaintiffs Mr. Willie S. Craft and wife Mary Craft live at 1019 Alaska. They live there with their own children as well as some grandchildren of theirs. The normal number of people living in the house is approximately twelve or thirteen. Mr. and Mrs. Craft moved into the house at 1019 Alaska in October, 1972. At the time they moved into the house they noticed that there were two electric meters and two gas meters outside the house. They inquired about these meters and were told and could see themselves that one gas meter was closed and bolted closed by a pin of the type used by defendant Memphis Light, Gas & Water Division. One of the electrical meters was cut off. While it appeared that there were once two apartments in the house at 1019 Alaska, Mr. and Mrs. Craft have never had any knowledge of the two apartments in said house and in fact did not know how there could be two apartments in the house because of the arrangement of the house.

2. During the times that they have lived at the Alaska Street address, Mr. and Mrs. Craft have been billed at various times

under two different account numbers by defendant Memphis Light, Gas & Water Division. One account number was 02012186602 and was in the name of Willie S. Craft with an address of 1019 Alaska. The second account number was 02012186624 and was billed to Willie C. Craft of 1019 Alaska No. 2. During the time from October, 1972 until the present date Mrs. Craft has made trips to the office of defendant Memphis Light, Gas & Water Division on at least seven occasions and on two occasions stayed at that office throughout the entire business day. On at least five occasions, utilities of Mr. and Mrs. Craft have been cut off without prior notice or opportunity for any hearing. Mr. and Mrs. Craft have never received a final notice of termination of service from the defendant Memphis Light, Gas & Water Division. Further, Mr. and Mrs. Craft have always made a payment prior to the dates stated on the monthly billing notices which is labeled, "Last date to pay net." On almost every occasion when Mrs. Craft has appeared in person before an employee of the defendant Memphis Light, Gas & Water Division at their office she was met with rudeness and a total lack of appreciation for the problem which she has presented to said employees. On one occasion when Mrs. Craft stopped a person at her home who was responsible for terminating her utilities and called an employee at Memphis Light, Gas & Water Division to explain that she had paid her bill, she was met only with the response of, "Pay it again." In December, 1973, Mr. and Mrs. Craft received a billing to Willie C. Craft for $91.60. They also received a billing to Willie C. Craft for $26.10. They have on another occasion been billed in both names for a complete duplicate of services including a city service fee on each bill. For sixteen months Mr. and Mrs. Craft have been unable to reach anyone within the Memphis Light, Gas & Water Division who will correct the problem which exists concerning the availability of utilities to their home.

3. On one occasion Mr. and Mrs. Craft were advised by an employee of defendant Memphis Light, Gas & Water Division

that if they would completely remove one of the gas meters and one of the electric meters at their home then the problem would be solved. This advice also came from an employee of defendant Memphis Light, Gas & Water Division who had come to their house on one of the many occasions to terminate their utilities. In November, 1973, Mr. and Mrs. Craft paid $152.20 for the complete removal of both the additional electric and gas meters. And then with only one gas meter and one electric meter at their home in November, 1973 they received the above-mentioned double billing.

4. To deal with the double bill mentioned Mrs. Craft went to Memphis Light, Gas & Water Division and on January 21, 1974 paid $40.00 on the disputed amount and was told by a Memphis Light, Gas & Water Division employee that her utilities would not be terminated. Her new bill for February included an unidentified item labeled EPP of $25.00 and a deposit fee of $7.50. Although she received no billing in the name of Willie C. Craft, her new bill showed a back balance of $55.63. A copy of all of Mr. and Mrs. Craft's bills are attached as Exhibit A.

5. Because of the continued total lack of cooperation and sympathy with Mr. and Mrs. Craft and continued harassment by employees of defendant Memphis Light, Gas & Water Division in terminating their utilities, Mr. and Mrs. Craft are constantly on the lookout to try to stop the surreptitious termination of their utilities by defendant Memphis Light, Gas & Water Division employees.

6. Because of the past acts of the defendant Memphis Light, Gas & Water Division Mr. and Mrs. Craft live in fear of having their utilities terminated without any due process rights. If this happens they will suffer irreparable harm and so pray this Court on behalf of themselves and the class they represent that an injunction issue requiring due process hearings be held prior to the termination of utilities services.

7. As a result of the action of the defendant Memphis Light, Gas & Water Division, Mr. and Mrs. Craft have suffered great mental anxiety as well as obvious financial loss occasioned by the dual billing for utilities. They ask this Court to award them damages both actual and punitive in the amount of $10,000.00, and to enjoin further termination of their utilities until the billing problem is resolved and a credit to their account for all overpayments in the past because of the dual billing cycle is made.

8. Mrs. Ida Bell Holmes and Mr. Sylvester Wade lived together for six years and had born to them four children, three of which are still living. Although there was never a ceremonial marriage, she and Mr. Sylvester Wade bought a home together at 730 Chelsea Avenue in Memphis. On August 22, 1973, there was a final separation between these two parties and Mrs. Holmes and the three children moved to a house at 796 Love Alley in Memphis, Tennessee. At the time they left the house at 730 Chelsea Avenue the utilities bills from defendant Memphis Light, Gas & Water Division was $45.00. On December 11, 1973 a hearing was held before the Juvenile Court Judge of Shelby County concerning support for the children. Although not written in the order, Mr. Wade agreed to move out of the house at 730 Chelsea Avenue and make the house available for Ms. Holmes and the children.

9. When Ms. Holmes contacted the defendant Memphis Light, Gas & Water Division to have utilities cut on at the address at 730 Chelsea Avenue she was told that there was a bill of $248.00 owing and that the utilities would not be turned on until the total amount of said bill was paid. She explained the total situation to an employee of defendant Memphis Light, Gas & Water Division including the fact that she had the utilities in her name at 796 Love Alley since August, 1973 and that the bill there was current. Her only request was to trans-

fer her utilities from the Love Alley address to the Chelsea Avenue address.

10. She was told that the defendant Memphis Light, Gas & Water Division would refuse to do so until the total $248.00 bill was paid. Even though she feels she has no responsibility for more than $45.00 of said bill, she has offered to pay in installments one half of the $248.00 bill. This offer was also refused by the defendant Memphis Light, Gas & Water Division.

11. Because of the actions and the refusal of the defendant Memphis Light, Gas & Water Division to transfer utilities from 796 Love Alley to 730 Chelsea Avenue for Ms. Holmes, she is continuing to suffer irreparable harm in that the house at 730 Chelsea Avenue which is available for her and her children cannot be lived in because of the refusal of defendant Memphis Light, Gas & Water Division to furnish utilities.

12. In addition to a temporary restraining order/preliminary injunction ordering the defendant to supply utilities to Ms. Holmes at 730 Chelsea Avenue, Ms. Holmes demands $10,000.00 actual and punitive damages against the defendant.

13. Mrs. Annie Sue Funzie who lives with her seven children at 968 Leath in Memphis, Tennessee moved into her house on October 7, 1973. When she moved into the house the water and electricity were on, but the gas was cut off. When Mrs. Funzie received the first billing from defendant Memphis Light, Gas & Water Division on October 25, 1973 it totaled a net amount of $125.80, the largest amount being $76.11 for water. Mrs. Funzie had previously mailed her deposit to Memphis Light, Gas & Water Division and does not know when the first meter reading was made. Because of this extremely large amount due on her very first bill and because of Mrs. Funzie's quite limited income, she simply never could catch up in her payments to defendant Memphis Light, Gas & Water Division. In December, 1973 she received a "final notice" from the defendant Memphis Light, Gas & Water Division which stated that if she did not pay her outstanding bill of $156.21 that her utilities would be disconnected on December 26, 1973. She was unable to meet this deadline. Her utilities were not terminated on that date, however.

14. Her daughter, Ms. Annie Jeanetta Harris, went to Memphis Light, Gas & Water Division on January 10, 1974 and paid $37.00. Mrs. Funzie was promised that defendant Memphis Light, Gas & Water Division would deduct $42.00 from Mrs. Funzie's bill if Mrs. Funzie would pay $50.00. After her daughter returned from Memphis Light, Gas & Water Division on January 10, an employee of defendant Memphis Light, Gas & Water Division came to Mrs. Funzie's house and disconnected her utilities. Mrs. Funzie called Memphis Light, Gas & Water Division four or five times between January 10, 1974 and January 18, 1974 and told different individuals there about the $37.00 payment. Although no more money was paid, on January 18, 1974 Mrs. Funzie's utilities were reconnected.

15. On February 11, 1974, Mrs. Funzie's utilities were terminated with no notice, final or otherwise. At the time of this termination of utilities three of her children were sick in her house, two with colds, and one with flu.

16. Mrs. Funzie has attempted in good faith to work out her billing problems with defendant Memphis Light, Gas & Water Division. The initial $76.11 worth of water used in fifteen days forms the basis of the dispute between her and defendant Memphis Light, Gas & Water Division. Yet there is no one in Memphis Light, Gas & Water Division to whom Mrs. Funzie can turn, or has been directed, to work out this dispute. As a result Mrs. Funzie has lived for more than ten days during the cold months of 1974 without utilities.

17. Because of the damages she has suffered, Mrs. Funzie demands damages from the defendant Memphis Light, Gas & Water Division in the amount of $10,000.00.

18. In the second week of November, 1972, Mrs. Parks and her family moved into a house at 1192 Coker Street in Memphis, Tennessee. The utilities in the house were on at the time she moved in. After about one or one and one half months, Mrs. Parks called defendant Memphis Light, Gas & Water Division and explained that she had received no bill concerning her utilities. She was assured that a bill was forthcoming. Approximately two months later she called again and asked about the bill. She was again told that a bill would be forthcoming.

19. Approximately the last week in April or the first week in May, 1973 Mrs. Parks received her first bill from defendant Memphis Light, Gas & Water Division which was for a total of $375.00.

20. Mrs. Parks went to the office at Memphis Light, Gas & Water Division and attempted to explain the situation. She was met with a rude response and was able to get no one to listen to her situation. She tried to explain to personnel at Memphis Light, Gas & Water Division that since she had been working in the daytime and when she was home no one from Memphis Light, Gas & Water Division could have come, that it was impossible to read the gas meter since it was locked inside a "pantry". It was explained to her that the amount of gas used had been estimated and that it was "estimated right."

21. Mrs. Parks paid $20.00 and then later paid approximately $30.00. She received two more bills of more than one hundred dollars. Finally her utilities were terminated without notice in June, 1973 and she lived without utilities until September, 1973.

22. She at that point moved into a house with her son and the utilities were placed in his name so that she would be able to get utilities. Because no further problems had developed with Mrs. Parks and her son at their new address, there have been no further attempted disconnections of utilities or disagreements with defendant Memphis Light, Gas & Water Division.

23. However, in December, 1973 defendant Memphis Light, Gas & Water Division filed a lawsuit against Mrs. Parks for $352.21, apparently for the back utilities at the Coker Street address.

24. Mrs. Parks in good faith believes that it is the policy of defendant Memphis Light, Gas & Water Division to terminate the utilities of one who is charged with a delinquent bill and is receiving utilities under the name of another household member. She fears that her utilities will be terminated without notice or any due process hearing when her new address is learned. Because of the threat of this irreparable harm Mrs. Parks prays that the defendant Memphis Light, Gas & Water Division be restrained from terminating her utilities without due process of law.

Wherefore, Plaintiffs respectfully pray on their own behalf, and on behalf of all others similarly situated, that this honorable Court:

1. Assume jurisdiction of this cause pursuant to 28 U.S.C. 1343(3)(4) and U.S.C. 1983 to determine this controversy and set this case down promptly for a hearing.

2. Determine by order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure that this action may be maintained as a class action both as to the plaintiff class and as to the defendant class.

3. Enter preliminary and permanent injunctions as authorized by 42 U.S.C. 1983 and pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants Memphis Light, Gas & Water Division, Calvin Henze, Henry T. Winkelman, Eliot Whittington, Robert S. Bowers, Patricia Shaw, an Unknown Number of Unnamed Utilities Termination Personnel, and the class they represent, the successors in office of all the above-mentioned persons, their agents, employees, and all persons in active concert and participation with the above-named defendants from terminating utilities of the named plaintiffs and the class they represent without adequate notice, opportunity for a hearing, at a meaningful place and at a meaningful time, an opportunity to cross-examine witnesses and present oral evidence in their own behalf, a right to be heard by counsel, all before a fair and impartial hearing examiner.

4. Enter preliminary and permanent injunctions as authorized by 42 U.S.C. 1983 and pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendant Memphis Light, Gas & Water Division, their successors in office, agents, employees and all other persons in active concert and participation with said defendants from denying to plaintiffs Holmes and the class she represents utilities benefits without a proper opportunity for a hearing at a meaningful time and in a meaningful manner, an opportunity to present witnesses and cross-examine adverse witnesses, the right to be heard by counsel, all before a fair and impartial hearing examiner.

5. Enter a final judgment pursuant to 28 U.S.C. 2201 and 2202 and Ru[illegible] 54, 57, 58 of the Federal Rules of Civil Procedure declaring that the termination of utilities and the policies governing termination of utilities by defendants Memphis Light, Gas & Water Division, Calvin Henze, Henry T. Winkelman, Eliot Whittington, Robert S. Bowers, and Patricia Shaw, through their agents and employees, and by the Unknown Number of

Unnamed Utilities Termination Personnel and the class they represent are unconstitutional in that said policies violate the plaintiffs' rights and the rights of all others similarly situated to due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

6. Enter an order that if the dispute between any of the defendants, their successors in office, agents, employees, and all other persons in active concert and participation with them and a customer arises solely out of a deficiency resulting from failure of the defendant to promptly and accurately bill said customer, that the defendants shall not terminate, cut off, or interfere with residential utility service to said customer owing such deficiency upon the failure or refusal of the customer to pay in cash the full amount of the deficiency, but the deficiency shall be prorated and billed to the customer in monthly installments not greater an amount than the average monthly amount for utilities used by the customer or customers occupying the residence for the preceding twelve-month period. Such prorated payment shall be paid in addition to the regular current charges to the customer.

7. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure allow the plaintiffs their costs herein and also grant them, and all persons similarly situated, such additional or alternative relief, including payment of all monies wrongfully withheld as may seem to this Court to be just, proper, and equitable.

8. Grant to plaintiffs Willie S. Craft and Mary Craft $10,000.00 in actual and punitive damages; to plaintiff Annie Sue Funzie $10,000.00 in actual and punitive damages; to plaintiff Ida Bell Holmes $10,000.00 in actual and punitive damages; to plaintiff Sarah Parks $10,000.00 in actual and punitive damages;

and further actual and punitive damages to members of the classes they represent.

Respectfully submitted,

G. PHILIP ARNOLD
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276-2741

THOMAS M. DANIEL
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(Certificate of service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

(Title omitted in printing)

ANSWER TO AMENDED COMPLAINT

(Filed May 7, 1974)

Come now the defendants herein, relying on and not waiving the Motion to Dismiss the Complaint heretofore filed in answer to the Amended Complaint, states as follows:

First Defense

The Amended Complaint fails to state a claim upon which relief can be granted.

Second Defense

This Court is without jurisdiction to grant the relief sought under the provision of 42 United States Code 1983.

Third Defense

The complaint does not meet the requirements of Rule 23 and cannot be maintained as a class action.

Fourth Defense

The defendants in answer to the allegations of the particular paragraphs of the Amended Complaint answer as follows:

I

Defendants admit that the plaintiffs are or have been customers of the Memphis Light, Gas and Water Division but deny that this is an appropriate class action, as either a plaintiff class or a defendant class; and further deny that the defendants have violated the plaintiffs constitutional right to due process under the Fourteenth Amendment to the Constitution of the United States.

II

The defendants deny that this Court has jurisdiction in this cause.

III

The defendants admit the allegation of Paragraph III.

IV

The defendant admit the allegation of Subparagraph 1 in Paragraph IV. The defendants further admit that Calvin Kenze is President of Memphis Light, Gas & Water Division; that Henry T. Winkelman is the Vice-President and a Commissioner of the Memphis Light, Gas and Water Division; that Eliot Whittington is a Commissioner of the Memphis Light, Gas and Water Division; that Robert S. Bowers is a Commissioner of the Memphis Light, Gas and Water Division; and that Mrs. Patricia Shaw is a Commissioner of the Memphis I ight, Gas and Water Division; but deny that any of the foregoing in any capacity have made or implemented any unconstitutional practices as alleged herein. The defendant further denies that Subparagraph 7 of Paragraph IV complies with the provisions of Rule 23 concerning class actions.

V

The defendants reiterate and rely herein on the Motion to Dismiss heretofore filed and would state the Amended Complaint does not state a proper class action as required by Rule 23 of Federal Rules of Civil Procedure. The defendants further deny that the Amended Complaint falls within the purview of Rule 23 (A) and (B)(2) and denies:

(a) That the alleged class is so numerous that joinder of all members of the class is impractical;

(b) There are questions of law and facts common to the alleged class;

(c) The claims of the representative parties are typical to the claims of the alleged class; and the representative parties will fairly and adequately protect the interest of the alleged class;

(d) That the party opposing the alleged class has acted on grounds generally applicable to the alleged class; thereby making an appropriate final injunctive and declaratory relief with respect to the class as a whole appropriate.

The defendant alleges that the claims or defenses of the representative parties are not typical of the claims or defenses of the alleged class as required by Rule 23; and further that membership of the class would be impossible to determine because of the vagueness of its description. The defendant denies the remainder of the allegations of Paragraph V and denies that the defendants have deprived the plaintiffs or anyone else of constitutional rights.

The defendants rely on the foregoing in answer to Subparagraphs 1, 2, and 3 of Paragraph V in the Amended Complaint.

Fifth Defense

Defendants in answer to the portion of the Amended Complaint designated Statement of the Case respond as follows:

1. Defendants admit that plaintiffs Mr. Willie S. Craft and wife Mary Craft live at 1019 Alaska. They neither admit nor deny the number of people living therein for lack of information thereof. The defendants admit that the plaintiff Craft purchased the property in October, 1972, and admit that at the time they moved into the house they noticed that there were two gas meters and two electrical meters outside the house. The defendants deny that one gas meter was closed and bolted by the defendants or their agents; and deny for lack of information thereof any inquiry on the part of the plaintiffs Craft. The defendants deny that one of the electrical meters was cut off at that time but admit that it appeared that there were once two apartments in the house at 1019 Alaska as alleged in the Amended Complaint.

2. The defendants admit that Mr. and Mrs. Craft had been billed at various times under two different account numbers by the defendants' agents or employees but deny for lack of information thereof that Mrs. Craft has made several trips to the office of the Memphis Light, Gas and Water Division or stayed at the office throughout the entire business day. The defendants deny the remainder of the allegations of Paragraph 2 with the exception that the defendants admit that Mr. and Mrs. Craft received a billing in December of 1973 in the amount of $91.60 on Account No. 02-012-18-660-2 and $26.10 on Account No. 02-012-18-662-4.

3. The defendants neither admit nor deny the allegations of the first sentence of Paragraph 3 for lack of information thereof. The defendants admit the gas and electric service was combined from two meters to one meter on October 23 and October 24, respectively but deny that plaintiffs were charged a double amount for the services, but allege that, although two bills were sent, they reflected only a charge commensurate with single meters.

4. The defendants admit that Mrs. Craft went to the Memphis Light, Gas and Water Division; and, on or about January 21, paid $40 on the amount owed the Division for utility services rendered to her. The defendants further show that Mrs. Craft accepted the utilization of the extended payment plan of the Memphis Light, Gas and Water Division, which was represented by $25 deferred payment; and that a deposit fee of $7.50 was included therein; and that, in addition thereto, a balance of $55.06 was due and owing.

5. The defendants deny the allegation of Paragraph 5.

6. The defendants deny the allegation of Paragraph 6 and deny that plaintiffs are entitled to the relief sought.

7. The defendants deny the allegation of Paragraph 7 and deny that plaintiffs are entitled to the relief sought.

For affirmative defense with regard to the plaintiffs Craft, the defendants would show as follows concerning the Craft account:

(a) The previous tenants were Charlie Hall connected April 23, 1970, and disconnected August 3, 1972, on account number (02)912-18-660-1. Ed Fatheree connected February 14, 1969, and disconnected January 5, 1973, on account number (02)012-18-662-3.

(b) Property sold to Willie and Mary Craft on October 9, 1972, (verified by Shelby County Tax Office.)

(c) This was a two (2) apartment residence, having two (2) gas, two (2) electric and one (1) water meter. The water meter served the two apartments.

(d) One (1) gas and one (1) electric meter connected in name of Willie C. Craft on account number (02)012-18-660-2, October 9, 1972.

(e) One (1) gas, one (1) electric and the water meter remained on in name of Ed Fatheree on account number (02)012-18-662-4 until a no pay disconnect was made on January 5, 1973. A final bill in the amount of $55.06 remains unpaid.

(f) Account number (02)012-18-662-4 was not put in name of Willie C. Craft until June 1973, connect effective January 5, 1973.

(g) Request made to Mann Electric Company on October 12, 1973, to combine the two sets of meters to one (1) set. (Plumber was paid by Mann Electric Company.)

(h) Gas service was combined from two (2) meters to one (1) meter by Albert Cook Plumbing Company. Work completed on October 23, 1973.

(i) Electric service was combined from two (2) meters to one (1) meter by Mann Electric Company. Work completed on October 24, 1973.

(j) Mr. and Mrs. Willie C. Craft are now receiving one (1) billing for one (1) gas, one (1) electric and one (1) water meter.

That attached hereto as Exhibit "A" are the Memphis Light, Gas and Water Division's records for the accounts at 1019 Alaska.

8. For lack of information, the defendants neither admit nor deny the marital status of Mrs. Ida Bell Holmes and Mr. Sylvester Wade; but the defendants admit that Ida Bell Holmes and Sylvester Wade lived together at 730 Chelsea Avenue, Memphis, Tennessee, on or about December 13, 1972. The defendants admit that the plaintiff, Mrs. Holmes, moved to 796 Love Alley, but deny the date of the move as the service was not connected at Love Alley until October 4; and the defendants further admit that there was a balance due in the approximate amount set out in the Amended Complaint. The defendants deny the remainder of the allegations of Paragraph 8 for lack of information thereof.

9. The defendants admit that there was an outstanding bill in the approximate amount at 730 Chelsea Avenue as alleged in Paragraph 9; and defendants admit that service would not be restored to the Chelsea address until appropriate arrangements for payment of the outstanding bill were made. Defendants deny that Mrs. Holmes moved in August and deny the remainder of the allegations of Paragraph 9.

10. The defendants admit that service would not be restored at 730 Chelsea until appropriate arrangements for paying the outstanding bill were made, as the plaintiff was the admitted owner of the premises since October, 1972, and had lived therein.

11. The defendants deny the allegation of Paragraph 11.

12. The defendants deny that the plaintiff is entitled to the relief sought in Paragraph 12. For affirmative defense, the defendants would show that:

At the time Mrs. Ida Bell Holmes requested service transferred to 730 Chelsea, an investigation revealed that Mrs. Holmes had been living at 730 Chelsea from March 17, 1972, through June 5, 1973, with utilities in the name of Jessie Lee Holmes, her son. Service was also used from July 26, 1973, through October 1, 1973, in the name of Sylvester Wade with an unpaid utility bill in the amount of $245.56 for service used between the above dates. Mrs. Holmes admitted that she lived there during these periods of time but refused to pay or make arrangements on the outstanding bill.

Attached hereto as Exhibit "B" to the answer are the records of the Memphis Light, Gas and Water Division concerning 730 Chelsea Street.

13. The defendants admit that Mrs. Annie Sue Funzie lives at 968 Leath Street in Memphis, Tennessee, and admits that she received a bill in the amount set forth in the Amended Complaint. The defendants further admit that she received a final notice from the Memphis Light, Gas and Water Division as stated in the Amended Complaint but that her services were not terminated when the customer called in requesting an extension.

14. The defendants admit that someone made a $37 payment on January 10, 1974, and that service was restored on that date; and further admit that Mrs. Annie Sue Funzie was given credit in the amount of $37.33 because of a water leak. The defendants allege that the records of the Memphis Light, Gas and Water Division reflect that service was disconnected on January 7, 1974, for nonpayment and was restored after a partial payment was made on January 10, 1974.

15. The defendants deny that Mrs. Funzie's utilities were terminated without notice on February 11 and deny for lack of information thereof the condition of her children.

16. The defendants deny the allegations contained in Paragraph 16 and allege that the plaintiff was aware of and participated in the extended payment plan which is available to those who have difficulty in making utility payments. The records of the Memphis Light, Gas and Water Division concerning the plaintiff are attached hereto as Exhibit "C".

17. Defendants deny the allegations contained herein and deny that Mrs. Funzie is entitled to any damages from the Memphis Light, Gas and Water Division in any amount.

18. The defendants admit that on September 12, 1972, service was connected into a house at 1192 Coker Street in Memphis, Tennessee, in the name of Sarah Lee Parker, but the defendants deny the remainder of the allegations of Paragraph 18 for lack of information thereof.

19. The defendants deny that in the last week in April or the first week in May, 1973, Mrs. Parks received her first bill from the Memphis Light, Gas and Water Division and deny that the bill was in the amount of $375.00. Plaintiff's records are attached as Exhibit "D".

20. The defendants deny the allegations of Paragraph 20.

21. The defendants admit that Mrs. Parks paid $20 on April 10, 1973, and $30 on April 25, 1973, but deny that her utilities were terminated without notice and deny for lack of information thereof the remainder of the allegations of Paragraph 21 concerning Mrs. Parks living without utilities.

22. The defendants neither admit nor deny the allegations of Paragraph 22 for lack of information thereof.

23. The defendants admit the allegations of Paragraph 23.

24. The defendants deny the allegations of Paragraph 24 and deny that Mrs. Parks' utilities were terminated without due process of law or that she is entitled to the relief sought. The defendants allege that Mrs. Parks lived at the Coker Street address for approximately ten (10) months with utilities and paid only $50 during this period of time; and that, in addition thereto, Mrs. Parks had availed herself of the extended payment plan offered by the Memphis Light, Gas and Water Division as assistance to its customers in paying their bills.

The defendants deny that the plaintiffs are entitled to any relief sought in the prayer set forth in the Amended Complaint.

VI

For additional affirmative defense, the defendants would show that the procedure used in reference to billing customers including the plaintiffs is as follows:

That all customer accounts are classified into three categories, (1) good pay customer, (2) slow pay customer and (3) new customer. Basically, guidelines have been established to provide termination of services to a new customer after a period of up to 65 days consumption. The same length of time will be allowed a slow pay customer. A slow pay customer is classified in this manner because of previous disconnection of services or checks received in payment of bill which have been returned by the bank for non-sufficient funds. A good pay customer who has established a good paying record will be allowed an additional 30 days, i.e., a maximum of 95 days consumption before his services are terminated.

That Notice of Termination is provided the customer in the following manner, which procedure was followed with regard to the plaintiffs herein.

The slow pay or new customer will have received two bills (regular and final notice which set out the exact date service will be terminated), said bills attached hereto as Exhibits "E" and "F", respectively, and attempts are made to personally contact customer by Meter Reader when terminating the electric service and by the Customer Serviceman when terminating the gas and water services. If customer is not contacted, the person terminating service will leave a cut-off notice (Attached as Exhibit "G") stating that the bill can be paid at any of the approximate 100 locations throughout Memphis and Shelby County and call the Division to have service restored. The services can be restored on the same day if customer pays the bill or makes arrangements before 4:00 p.m. Services will be restored on the same day after 4:00 p.m. if there is sickness or extreme hardship. Also, cut-offs may be delayed due to extreme weather conditions or holiday weekends. Service Advisors are available to provide service assistance on a 24 hour basis.

Steps in providing and terminating services are:

Step 1: Service is connected upon request by telephone through the Information Center, in person at the Administration Building or at the Millington Office.

Step 2: If meter reading date falls within 5 days after connection of service, no bill will be rendered. Therefore, the first billing will be for consumption over a period of 6 to 35 days.

Step 3: Approximately 4 days after meter reading date, bill will be mailed to service address or to any address designated by customer.

Step 4: As indicated on the bill, last day to pay net amount would be approximately 20 days after meter reading date.

Step 5: Approximately 24 days after the meters are read, a final notice is mailed stating that service will be disconnected within approximately 4 days if no payment is received or some provision made for payment of the outstanding balance. Final notice will not be mailed if customer owes less than $26 or the Division holds a deposit equal to twice the outstanding balance. A "Stuffer" (attached as Exhibit "H") is included with the final notice requesting the customer to contact the Credit and Collections Department if he is having difficulty paying the bill and, also, announcing an appropriate neighborhood location for credit assistance. As a convenience to the customer, neighborhood locations were established in 1973 at Greater Community Temple Church located at 924 Dunlap and Sanders Drug Company located at 565 S. Parkway East to provide credit assistance.

Step 6: As indicated on the final notice, one service (electric) will be terminated by Meter Reader. Cut-off of service will not be affected if in response to knock on the door the customer states that payment is in the mail, shows paid receipt, there is illness or hardship. At this point there can be a maximum of 65 days consumption. Step 6 can be avoided if customer will avail himself of the Extended Payment Plan as described in Exhibit "I" or contact the Division requesting an extension of time to pay.

Step 7: Approximately 5 days after the one service cut-off the remaining services (gas and water) will be terminated if the customer has not paid the bill or made arrangements for payment.

Step 8: If a customer has not contacted the Division within approximately 10 days after all services are terminated, a Customer Serviceman will be requested to verify that all services are still off. If a Customer Service-

man finds an unauthorized reconnection of services, the services will again be cut-off.

Step 9: After an additional 20 days from previous verification, if the Meter Reader on his regular scheduled meter reading route finds a second unauthorized reconnection, an order will be issued for the removal of meters.

The defendants allege that extensive efforts have gone into development of an Extended Payment Plan which has gained recognition throughout the utility industry as evidenced by the many requests from other utility companies regarding the details of the Division's plan put into effect March 1, 1973. The plan is considered to be liberal and sensitive to the needs of the community. Basically, it allows for ½ payment of a past due bill with the balance being extended in equal payments on the three subsequent bills. However, each account is handled on an individual basis with more or less initial payment, and as much as 12 months being allowed for payment of the balance in the very extreme hardship cases. This plan has been widely publicized in the news media and by posters being placed in more than 1,000 businesses throughout the City.

The defendants further allege that if credit counselors available to assist customers who have difficulty with payments or disputes concerning their bills cannot satisfy the customers, then the customer is referred to management personnel generally Glyn Frost, Chief Clerk, Credit; Joe Xiques, Supervisor, Credit and Collection; Frank R. Harty, Superintendent, Credit and Collection. In addition to the foregoing, management at all levels including the Board of Commissioners of the Memphis Light, Gas and Water Division can hear complaints regarding bills, termination of service, or any other matter relating to the operation of the Memphis Light, Gas and Water Division and can, if they so desire, be accompanied by appropriate representatives.

And now, having fully answered, the defendants pray that they be hence dismissed with the reasonable costs.

Respectfully submitted,

E. BRADY BARTUSCH
Attorney for Memphis Light, Gas
and Water Division
1512 First National Bank Building
Memphis, Tennessee 38103

Willie C. Craft
1019 Alaska
02-012-18-660-2

Service connected October 9, 1972

	NET	GROSS-DIFF.
Service to meter reading date 10-26-72		
Delinquent 11-15-72		
Gas	$ 5.54	$ .27
Electric	5.39	.26
City Service Fee	4.33	
Deposit	25.00*	
	$40.26	$40.79

* Billed on first bill

Service to meter reading date 11-27-72		
Delinquent 12-15-72		
Gas	$16.70	$ .81
Electric	9.85	.43
City Service Fee	2.50	
	$29.06	$30.35

Service to meter reading date 12-28-72		
Delinquent 1-18-73		
Gas	$20.96	$ 1.01
Electric	10.55	.51
City Service Fee	2.50	
	$34.01	$35.53

Service to meter reading date 1-29-73		
Delinquent 2-16-73		
Gas	$20.76	$ 1.00
Electric	11.11	.54
City Service Fee	2.50	
	$34.37	$35.91

Service to meter reading date 2-27-73		
Delinquent 3-19-73		
Gas	$18.70	$ .90
Electric	10.23	.49
City Service Fee	2.50	
	$31.43	$32.82

	NET	GROSS-DIFF.
Service to meter reading date 3-28-73		
Delinquent 4-17-73		
Gas	$12.32	$ .60
Electric	10.36	.50
City Service Fee	2.50	
	$25.18	$26.28

Service to meter reading date 4-27-73		
Delinquent 5-17-73		
Gas	$12.24	$ .59
Electric	10.30	.50
City Service Fee	2.50	
	$25.04	$26.13

Service to meter reading date 5-29-73		
Delinquent 6-18-73		
Gas	$10.62	$ .51
Electric	11.03	.53
City Service Fee	2.50	
	$24.15	$25.19

Service to meter reading date 6-27-73		
Delinquent 7-18-73		
Gas	$ 7.69	$ .37
Electric	11.59	.56
City Service Fee	2.50	
	$21.78	$22.71

Willie C. Craft
1019 Alaska
02-012-18-662-4

Service DCO'd 1-5-73 in name of Ed Fatheree tenant #3.
Meter reading date 5-29-73 - Occupant service as follows:

Electric 877 K.W.H.
Water 92 CCF

Occupant disconnect (69) made before connect made.

Connected effective 1-5-73, (DCO date) for Willie C. Craft
F/M #2 Rev. month July 1973

	NET	GROSS
Service to meter reading date 6-27-73 (first billing)		
Delinquent 7-18-73		
Gas	$ 6.53	$ .32
Electric	47.05	2.27
Water	27.57	1.31
City Service Fee	17.16	
Sewer Charge	17.26	
	$115.57	$119.47

Service to meter reading date 7-27-73
Delinquent 8-16-73

Gas	$ 9.99	$ .48
Electric	12.17	.59
City Service Fee	2.50	
Balance	22.71	Brought Forward
	$47.37	$48.44

Service to meter reading date 8-27-73
Delinquent 9-17-73

Gas	$10.69	$ .52
Electric	11.85	.57
City Service Fee	2.50	
Balance	48.44	Brought Forward
	$73.48	$74.57

Service to meter reading date 9-26-73
Delinquent 10-16-73

Gas	$10.69	$ .52
Electric	11.10	.54
City Service Fee	2.50	
Balance	74.57	Brought Forward
	$98.86	$99.92

Service to meter reading date 10-26-73
Delinquent 11-15-73

Gas	$ 6.00	$ .29
Electric	7.90	.38
City Service Fee	2.50	
Balance	99.92	Brought Forward
Balance	7.50	Disconnect Charge
	$123.82	$124.49

Service to meter reading date 11-27-73
Delinquent 12-17-73

Gas	$14.66	$ .71
Electric		Disconnected 10-26-73
City Service Fee	2.50	
Balance	124.49	Brought Forward
Credit	24.49	Paid 11-12-73
Credit	100.00	Adjustment (11-13-73) to set up payments at $25.00 each
Balance	25.00	Deferred payment
	$42.16	$42.87

Service to meter reading date 12-28-73
Delinquent 1-18-74

Gas	$21.23	$ 1.03
City Service Fee	2.50	
Balance	42.87	Brought Forward
Balance	25.00	Deferred Payment
	$91.60	$92.63

Service to meter reading date 7-27-73
Delinquent 8-16-73

Gas	$ 1.14	$ .06
Electric	14.00	.68
Water	7.83	.37
City Service Fee	2.50	
Sewer Charge	4.74	
Balance	119.47	Brought Forward
Credit	50.00	Paid 7-24-73
	$99.68	$100.79

Service to meter reading date 8-27-73
Delinquent 9-17-73

Gas	$ 1.14	$ .06
Electric	13.22	.64
Water	9.26	.44
City Service Fee	2.50	
Sewer Charge	5.45	
	$31.57	$32.71

Service to meter reading date 9-26-73
Delinquent 10-16-73

Gas	$ 1.14	$ .06
Electric	2.44	.12
Water	12.86	.61
City Service Fee	2.50	
Sewer Charge	6.00	
	$24.94	$25.73

Service to meter reading date 10-26-73
Delinquent 11-15-73

Gas	$ 1.14	$ .06
Electric	6.63	.32
Water	6.21	.30
City Service Fee	2.50	
Sewer Charge	3.33	
	$19.81	$20.49

Service to meter reading date 11-27-73
Delinquent 12-17-73

Gas		Cut off 10-26-73
Electric	11.44	$ .55
Water	6.54	.31
City Service Fee	2.50	
Sewer Charge	3.49	
Balance	20.49	Brought Forward
	$44.46	$45.32

Service to meter reading date 12-28-73
Delinquent 1-18-74

Gas	$ 2.39	$ .12
Electric	11.18	.64
Water	6.54	.31
City Service Fee	2.50	
Sewer Charge	3.49	
	$26.10	$27.07

Gas	$ .19	
Electric	-0-	
Water	-0-	
City Service Fee	2.75	Credit
Balance	27.07	Brought Forward
Credit	2.39	Adjustment on gas
Credit	.12	Discount adj. 212
	$22.00	Final

Gas and electric removed. Water meter combined with account number 02-012-18-660-2

Service to meter reading date 1-29-74
Delinquent 2-18-74

Gas	$27.24	$ 1.15
Electric	11.96	.53
Water	7.11	.34
City Service Fee	2.50	
Sewer Charge	3.80	
Balance	92.63	Brought forward
Balance	3.00	Disconnect charge
Credit	40.00	Paid 1-22-74
Deposit	7.50	Billed (910)
Balance	25.00	Deferred payment (EPP)
	$137.42	$139.49
Final bill charge in		22.00 Same address Account #02-012-17-662-4
		30.00 Paid 2-20-74
Credit		$131.49 Balance

Service to meter reading date 2-27-74
Delinquent 3-19-74

Gas	$13.53	$ .00
Electric	10.97	.00
Water	6.54	.00
City Service Fee	2.50	
Sewer Charge	3.49	
Balance	25.00	Deferred payment (EPP)
Balance	131.49	Brought forward
Credit	44.03	Paid 3-20-74
Credit	44.03	Paid 3-29-74
	$177.46	Adjustment made to allow net

Service to meter reading date 3-28-74
Delinquent 4-18-74

Gas	$15.08	$ .73
Electric	11.02	.53
Water	8.45	.40
City Service Fee	2.50	
Sewer Charge	4.43	
Balance	113.24	Brought forward gross
Balance	1.78	Adjustment (212) service to 3-19-74
Credit	$152.91	$154.57

EXHIBIT C

Annie Sue Funzie
968 Leath
01-003-01-105-9
Connected 9-21-73

Service To Meter Reading Date Sept. 25, 1973 -- No Billing On Gas-Elec.-Water

	NET	GROSS	CONSP.	READING	
Billed Deposit Only	$ 25.00			4836	(G)
				6632	(E)
				183	(W)
Total	$ 25.00				
Credit-Paid Oct. 16, 1973	12.50				
Bal. Due	$ 12.50				

Service To Meter Reading Date Oct. 25, 1973 -- Net Date Nov. 15, 1973

First Bill On Gas-Elec.-Water-CSF-Sewer

Gas	$ 14.91	$ .72	165	4945
Elec.	9.65	.47	417	6817
Water	76.11	3.62	349	505
City Service Fee	5.83			
Sewer	6.80			
Balance	12.50			
	$125.80	$130.61		
212 Co. Allowed Discount Made 11-7-73	-0-			
	$125.80			

Stop order card made to hold cut-off in P/F - No cut-off in November, 1973.

Service To Meter Reading Date Nov. 26, 1973 — Net Date 12-17-73

Gas	$ 13.02	$ .63	143	5088
Elec.	6.18	.30	210	7027
Water	4.86	.23	14	519
City Service Fee	2.50			
Sewer	2.69			
Balance	125.80			
	$155.05	$156.21		

December 19, 1973 - Final Notice mailed stating last day to pay Dec. 26, 1973.

December 26, 1973 - Customer called by phone to Gladys Dunn (Credit Dept.) requesting an extension. Extension granted to December 28, 1973.

January 7, 1974 - All Service (DCO) cut-off worked for $156.21. Service was cut-off.

-2-

January 10, 1974 - Customer came into office (Mary Carpenter) and paid $37.00 on bill.
All service cut-off cancelled and service was ordered turned back on.
Notation that customer to pay more on bill when her check that was lost is received and that adjustments were to be made water and sewer due to water leak soon.
Mrs. Carpenter also made $4.81 credit adjustment on difference net & gross.

Service To Meter Reading Date Dec. 27, 1973 -- Net Date Jan. 17, 1974

	NET	GROSS	CONSP.	READING	
Gas	$ 20.45	$ .99	248	5336	
Elec.	6.38	.31	218	7245	
Water	3.52	.17	10	529	
City Service Fee	2.50				
Sewer	2.05				
Balance	156.21				
	$191.11	$192.58			
		37.00			Credit 1-11-74
		$155.58			
		37.33			Credit Water & Sewer
		$118.25			
		4.81			Credit Difference Net & Gross
		$113.44			Balance Due

January 22, 1974 - Final Notice mailed stating last day to pay 1-25-74.

January 28, 1974 - One service cut-off issued for $113.44. Elec. cut-off.

February 1, 1974 - All service cut-off (DCO) for $113.44. Completed service cut-off.

February 11, 1974 -S09 verify DCO completed.

February 15, 1974 -Customer called into Credit Dept. (Nell Claunch) no turn on issued without payment.

February 21, 1974 -Customer came into office and paid $50.00 (Suzanne Wilson Credit Dept.).
The S09 and DCO were cancelled and $80.00 was set up on EPP Plan at $20.00 per month for four months with remaining balance of $35.34 to be paid on 3-5-74.

-3-

Service To Meter Reading Date Jan. 28, 1974 -- Net Date Feb. 15, 1974

	NET	GROSS	
Gas	$ 22.85	$ 1.10	
Elec.	11.65	.56	
Water	3.52	.17	
City Service Fee	2.50		
Sewer	2.05		
Balance	113.44		
Balance (Disconnect Charge For 1-7-74)	7.50		
	$163.51	$165.34	
		50.00	Credit Paid 2-21-74
Balance Due		$115.34	
EPP Credit Set Up		80.00	
Balance Due		$ 35.34	Extension To 3-5-74

February 26, 1974 - One service cut-off completed in error due to EPP credit adjustment not getting posted to account and stop order card being made out incorrect.

February 26, 1974 - Customer called Credit Dept. (Mary Carpenter) cancelled DCO and ordered service turn back on as cut err. 11:20 a.m.

February 26, 1974 - Service restored 1:53 p.m.

EXHIBIT D

Sarah Lee Parker
1194 Coker
003-53-670-4
Service Connected Effective 9-12-72

Service To 2-26-73

Gas	-	$ 86.71
Elec.	-	46.71
Water	-	72.76
C. S. Fee	-	16.58
S. C.	-	32.80
Deposit	-	25.00
		$280.34- Due

Service To 3-27-73

Gas	-	$ 13.72
Elec.	-	9.44
Water	-	15.42
C. S. Fee	-	2.50
S. C.	-	6.00
Balance	-	280.34-Brought Forward
		$327.42-Due

Service To 4-27-73

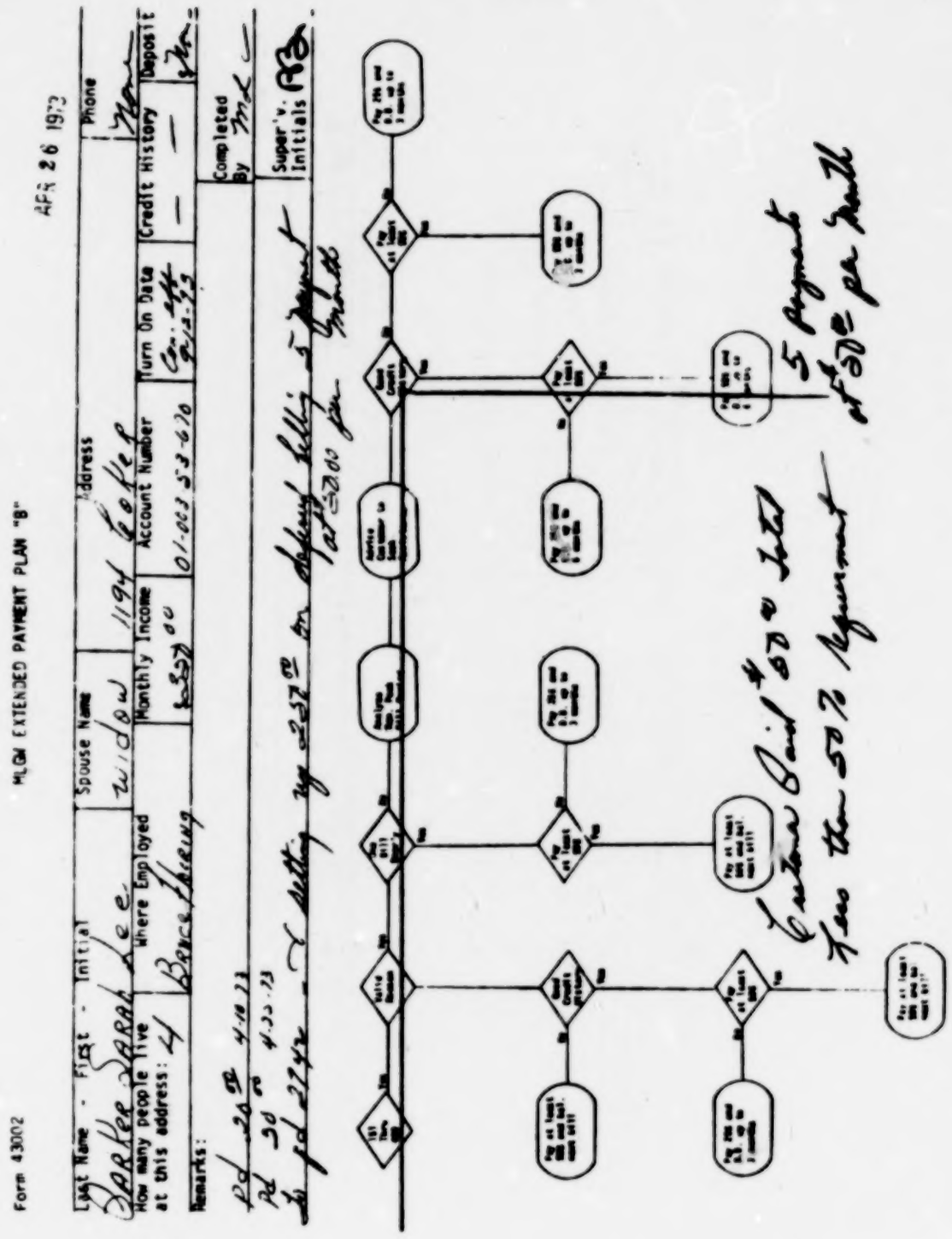
Gas	-	$ 12.25
Elec.	-	9.68
Water	-	17.28
C. S. Fee	-	2.50
S. C.	-	6.00
Balance	-	327.42-Brought Forward
Credit	-	20.00-Paid 4-10-73
Credit	-	30.00-Paid 4-25-73
Credit	-	250.00-Deferred Amount
		$ 75.13-Due

Service To 5-26-73

Gas	-	$ 7.74
Elec.	-	9.15
Water	-	16.74
C. S. Fee	-	2.50
S. C.	-	6.00
Balance	-	75.13-Brought Forward
Balance	-	50.00-Deferred Payment
		$167.26-Due

Service To 6-01-73 (Disconnect Date)

Gas	-	$ .51
Elec.	-	.19
Water	-	3.05
C.S. Fee	-	2.50-Credit
S. C.	-	1.20
Balance	-	167.26-Brought Forward
Balance	-	7.50-Disconnect Charge
Balance	-	200.00-Deferred Amount Brought Forward
Credit	-	25.00-Billed Deposit Cancelled
		$352.21-Final Billing



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5848123

MEMPHIS LIGHT, GAS AND WATER DIVISION
P.O. BOX 388, MEMPHIS, TENNESSEE 38145

READING DATE | ACCOUNT NUMBER

SERVICE FOR MONTH	PRESENT READING	CALCULATED BY (WATER AND C.U. FT.)	NET AMOUNT OF BILL

SALES TAX INCLUDED WHERE APPLICABLE

DAY DEMAND	GROSS AMOUNT TO BE PAID	NET AMOUNT TO BE PAID	LAST DAY TO PAY NET

SERVICE ADDRESS

EXHIBIT "E"

ADDRESS CORRECTION REQUESTED

MEMPHIS TENN.

FIRST CLASS MAIL U.S. POSTAGE PAID 1 OZ PERMIT NO. 88

PLEASE RETURN THIS STUB WITH PAYMENT
DO NOT FOLD, STAPLE OR SPINDLE

GROSS AMOUNT TO BE PAID	NET AMOUNT TO BE PAID	LAST DAY TO PAY NET

PAY ONLY TO MAIN OFFICE OR MILLINGTON OFFICE
AFTER OFFICE HOURS 8:30-5:00
CLOSED ON SATURDAYS SUNDAYS AND HOLIDAYS

EXHIBIT E

MEMPHIS LIGHT, GAS & WATER DIV.
FINAL NOTICE
THIS BILL IS NOW PAYABLE ONLY IN MAIN OFFICE
220 SOUTH MAIN OR AT MILLINGTON OFFICE

MEMPHIS LIGHT, GAS & WATER DIVISION
P.O. BOX 388, MEMPHIS, TENN. 38145
PHONE 523-0711
INFORMATION CENTER

LAST DAY TO PAY	ACCOUNT NUMBER	AMOUNT DUE

IF NOT PAID BY 8 P.M. THIS DATE SERVICE WILL BE DISCONNECTED.

ACCORDING TO OUR RECORDS YOUR SERVICE BILL IS OVERDUE FOR PAYMENT. IF NOT PAID BY 8 P.M. ON THE DATE INDICATED, IT WILL BE NECESSARY TO TERMINATE THE SERVICE. AN ADDITIONAL CHARGE WILL BE MADE FOR DISCONNECTION.

IF PAID, PLEASE DISREGARD THIS NOTICE.

EXHIBIT "F"

LAST DAY TO PAY	ACCOUNT NUMBER	AMOUNT DUE

IF NOT PAID BY 8 P.M. THIS DATE SERVICE WILL BE DISCONNECTED.

FINAL NOTICE

RETURN THIS STUB WITH PAYMENT

EXHIBIT F

EXHIBIT G

FORM-48036

MEMPHIS LIGHT, GAS AND WATER DIVISION
P.O. BOX 388, MEMPHIS, TENN. 38145
523-0711

Date_____ Amt._____

DISCONNECT SERVICE ORDER

NAME_____

ADDRESS_____

ACCT. NO._____

The MLGW will be pleased to reconnect your service later today. First, take this card and your red-and-white final notice to the nearest store accepting utility bill payments or come to our Administration Building at 220 South Main to pay your bill. Then call Customer Service at 523-0711 *before 4 p.m.* to notify us that your bill has been paid. When a serviceman arrives, show him your receipt for payment and he will reconnect service. If you call after 4 p.m., our serviceman may not get to your home to reconnect service until the next work day.

EXHIBIT "G"

EXHIBIT H

IMPORTANT NOTICE

If you are having difficulty paying your utility bill, bring your bill to our neighborhood credit counselors for assistance. Your utility bills may be paid here also. (No phone calls accepted at neighborhood locations.)

Place: Sanders Drug Store
S. Parkway and Lauderdale

Time: 3 to 6 p.m. May 3 through May 14, 1974
(No counseling available on Saturday or Sunday)

You can also receive credit help at the main office at 220 S. Main from 8:30 a.m. to 5 p.m., Monday through Friday.
Phone: 523-0711

EXHIBIT "H" MLGW CREDIT DEPARTMENT

IMPORTANT NOTICE

If you are having difficulty paying your utility bill, bring your bill to our neighborhood credit counselors for assistance. Your utility bills may be paid here also. (No phone calls accepted at neighborhood locations.)

Place: Greater Community Temple Church
Chelsea and Dunlap

Time: 3 to 6 p.m. May 22 through May 29, 1974
(No counseling available on Saturday, Sunday or Memorial Day, May 27, 1974)

You can also receive credit help at the main office at 220 S. Main from 8:30 a.m. to 5 p.m. Monday through Friday.
Phone: 523-0711

EXHIBIT "H" MLGW CREDIT DEPARTMENT

BEST COPY AVAILABLE

EXHIBIT I

PROCEDURE OF NEW CREDIT POLICY

EXTENDED PAYMENT PLAN

The new Credit Policy is implemented to prevent utility disconnection of customers who are in a temporary period of financial hardship.

The new policy will be directed in the following four ways:

1. A new credit policy to accept partial payment, postpone the unpaid balance and thereby remove the need to disconnect utility service for customers in a temporary financial crisis.

2. The sending of experienced ALGW credit persons into the community on an announced schedule to reach customers in their own neighborhoods.

3. The use of citizen volunteers to help inform customers on ways to conserve utilities and assist in identifying those who need temporary help.

4. A broad new information program to inform the community on ways to save money and energy in daily living.

EXTENDED PAYMENT PLAN

(EFFECTIVE MARCH 1, 1973)

Part 1

Purpose

A customer who is in a temporary period of financial adversity will be permitted to make a partial payment on his utility bill and postpone payment of the remaining portion until a date or dates in the immediate future without discontinuance of utility service.

Who May Apply

Any customer experiencing a hardship caused by illness or death in family, loss of employment, or other conditions that may have been beyond his control that would cause his utilities to be in jeopardy.

How to Apply

Customer must contact Credit Department by phone, letter or in person.

Guidelines

1. The amount postponed, as a general rule, will be one half of any single month's utility bill, by mutual agreement of the utility and the customer.
2. The amount postponed may be added to the next billing, or in part to the next three utility bills to be received by the customer.
3. If the amount postponed is to be billed in more than one payment, it will be handled as a deferred billing and will require that each payment be equal.

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4. The Credit Department Staff shall have authority to extend credit terms less or greater than the above described guidelines depending on the circumstances involved. They shall keep in mind that the policy of the Board is to be aware and sensitive as possible to the adversity and distress of the people we serve.

Procedure

1. Determine the customer's need and financial position. (See exhibits #1, #2, #3, and #4, attached)
   a. All customers will be handled on individual basis according to their needs.
   b. Payment plan used will be determined by amount of partial payment made at time of request and his ability to pay off balance.
   c. Paying record, if bad, including prior extensions granted may be waived where hardship cases are found.
   d. Normal length of time to defer payments will be three months if conditions warrant. However, in extreme hardship conditions, this time could be extended over a longer period.
2. After payment plan is agreed upon, prevent any further disconnects as long as customer has fulfilled his obligations.
3. A completed form showing payment schedule of deferred amounts to be paid and dates, would be given to customer. Deferred information would also be shown on the monthly statement as EPP (Extended Payment Plan), showing number of payments remaining and currently billing. (See Exhibit #5)
4. A record of the transaction will also be completed showing name, address, date, spouse's name, place of employment, telephone number and details about the transaction. This will be used for future references in dealing with the customer and also to supply better information for collection.

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Example

	February	March	April
Gas	41.00	35.00	20.00
Electric	12.00	10.00	7.00
Water	2.90	2.90	2.90
City Service Fee	2.50	2.50	2.50
Sewer	1.60	1.60	1.60
	60.00	52.00	14.00 EPP 2 pay rem
Paid	Paid 30.00	Balance 30.00	17.00 (payment #1 of 3)
	30.00	82.00	31.00
		Paid 31.00	
		51.00	

(deferred 3 payments)
$17.00-$17.00-$17.00

MEMPHIS LIGHT, GAS AND WATER DIVISION
MANAGEMENT INFORMATION SERVICES
PROCEDURE CHANGE FLASHES

DATE:	SUBJECT:	ISSUE NO. 3
3-5-73	CUSTOMER ACCOUNTING	REV. NO. 1

The "Deferred Billing" (91*) transactions will now be accepted in File Maintenance five (5) - (PCA15 computer program), as it is in File Maintenance one through four.

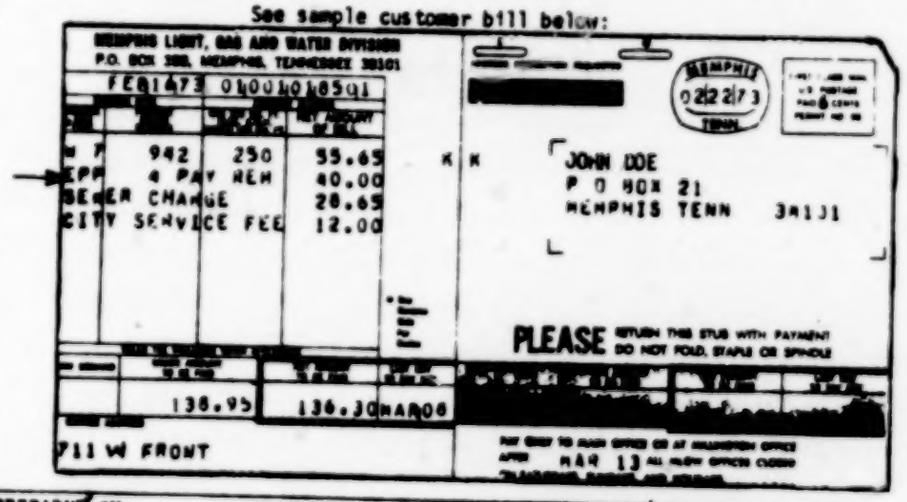
Personnel maintaining controls on File Maintenance computer runs, must establish a deferred billing control for File Maintenance five (5).

The deferred billing transaction totals will be located in the totals by section, and by cycle, of the "File Maintenance five (5)" register, under the heading "TRAN DEF".

The "Customer Utility Bill" will reflect the deferred service payments (915) due on the "EPP" billing line, along with the number of remaining payments. The "EPP" line could also include any other merchandise due.

Any "EPP" unpaid, will appear as a regular balance forward on the next billing.

See sample customer bill below:



PREPARED BY: Thomas Hardy

APPROVED BY: H W Martin

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EXTENDED PAYMENT PLAN

Neighborhood Credit Counseling

(Effective March 26, 1973)

Part 2

Purpose

To make it more convenient for customers who cannot contact us at our main office during normal working hours to go to a designated location in the neighborhood to discuss their utility bill and financial problem.

Neighborhood Location

1. Suitable locations, preferrably at a business that is presently collecting our utility bills and located in an area that experience has shown has a high non-payment disconnect record.
2. These locations must have ample space to accomodate two (2) small tables with two (2) chairs each in such a manner that would not interfere with the normal routine of the business location.
3. A reasonable compensation for the use of the space may be allowed if requested.
4. All Final Notices mailed, affecting the cycles in the area of the neighborhood location, will have a note enclosed informing the customers that we will be located in their neighborhood giving specified dates, times, and location.
5. No telephones will be needed as all decisions requiring further investigation will require that the customer be notified the next day by phone or letter. However, Master Records, Disconnect Stop Order Cards, Extended Payment Plan forms, Billing Cycle Charts,

and any other pertinent information that may be needed for the appropriate cycles will be taken to the area selected.

6. These locations are staffed with two (2) experienced Credit Counselors that report to work at 12 noon at the main office and work until time to leave for the neighborhood location and arrive there at 3 pm. The neighborhood location is closed at 7 pm with all transactions returned to the main office by 8 pm.

7. All Disconnect Stop Order Cards affecting the following day's cut-offs are given to the Data Processing Department to enter into the computer to prevent disconnect orders being routed for the next day.

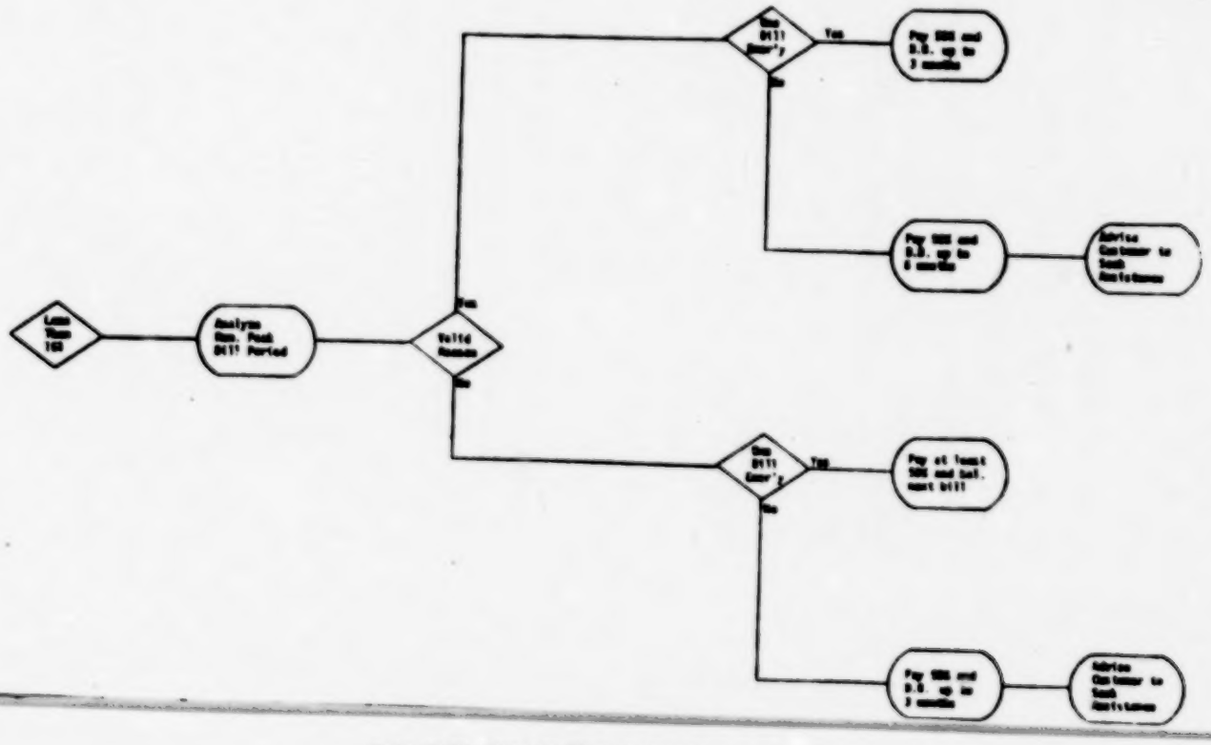
8. The two (2) Credit Counselors have the use of one (1) vehicle for transportation from the main office to the neighborhood location and return to the main office. (Special parking permits allow them to park their personal automobile in our garage.)

1 TO 4 DEPENDENTS	PLAN "A" LESS THAN 151	PLAN "B" 151 THRU 400	PLAN "C" AT LEAST 401
NO. DEPEND.			
5	201	450	451
6	251	500	501
7	301	550	551
8	351	600	601
9	401	650	651
10	451	700	701

Form 43001

MLGW EXTENDED PAYMENT PLAN "A"

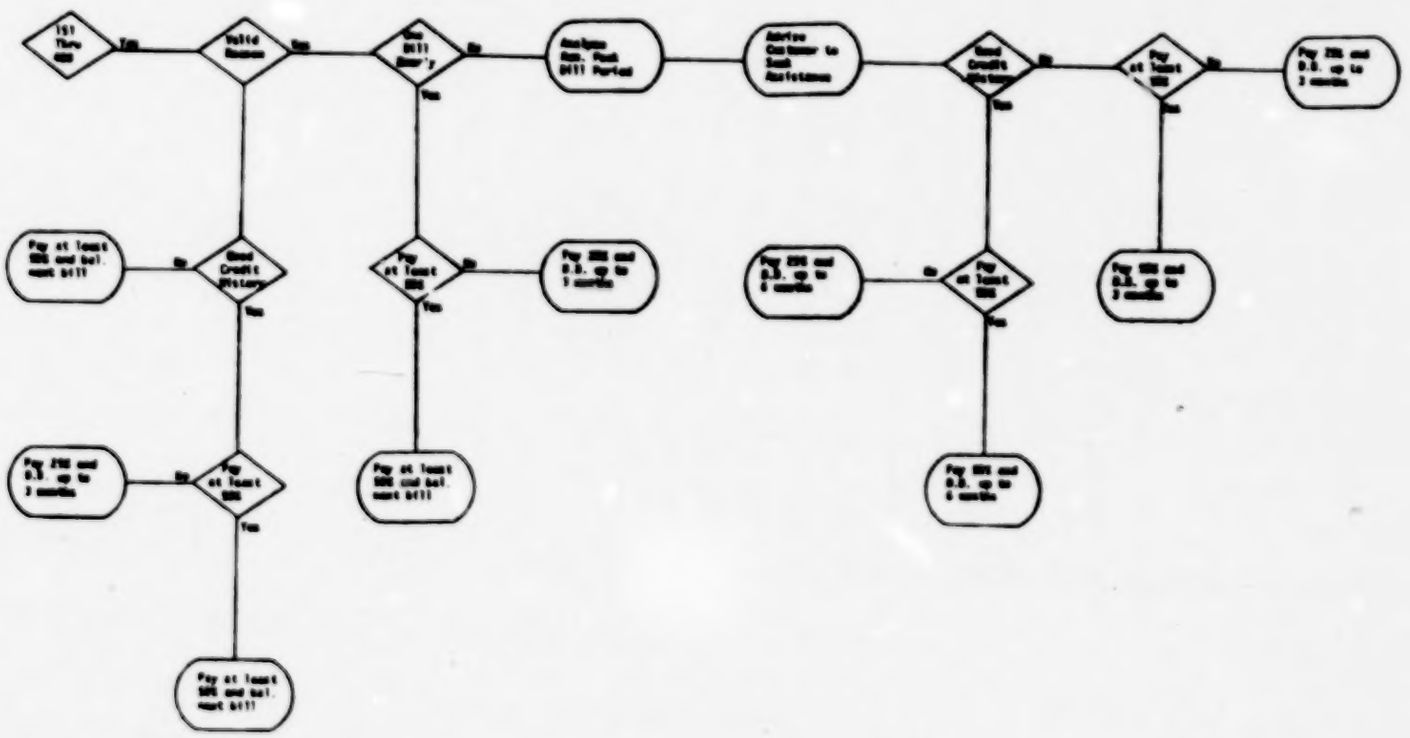
Last Name - First - Initial	Spouse Name	Address	Phone
How many people live at this address:	Where Employed	Monthly Income $	Account Number	Turn On Date	Credit History	Deposit $
Remarks:			Completed By
			Super'v. Initials

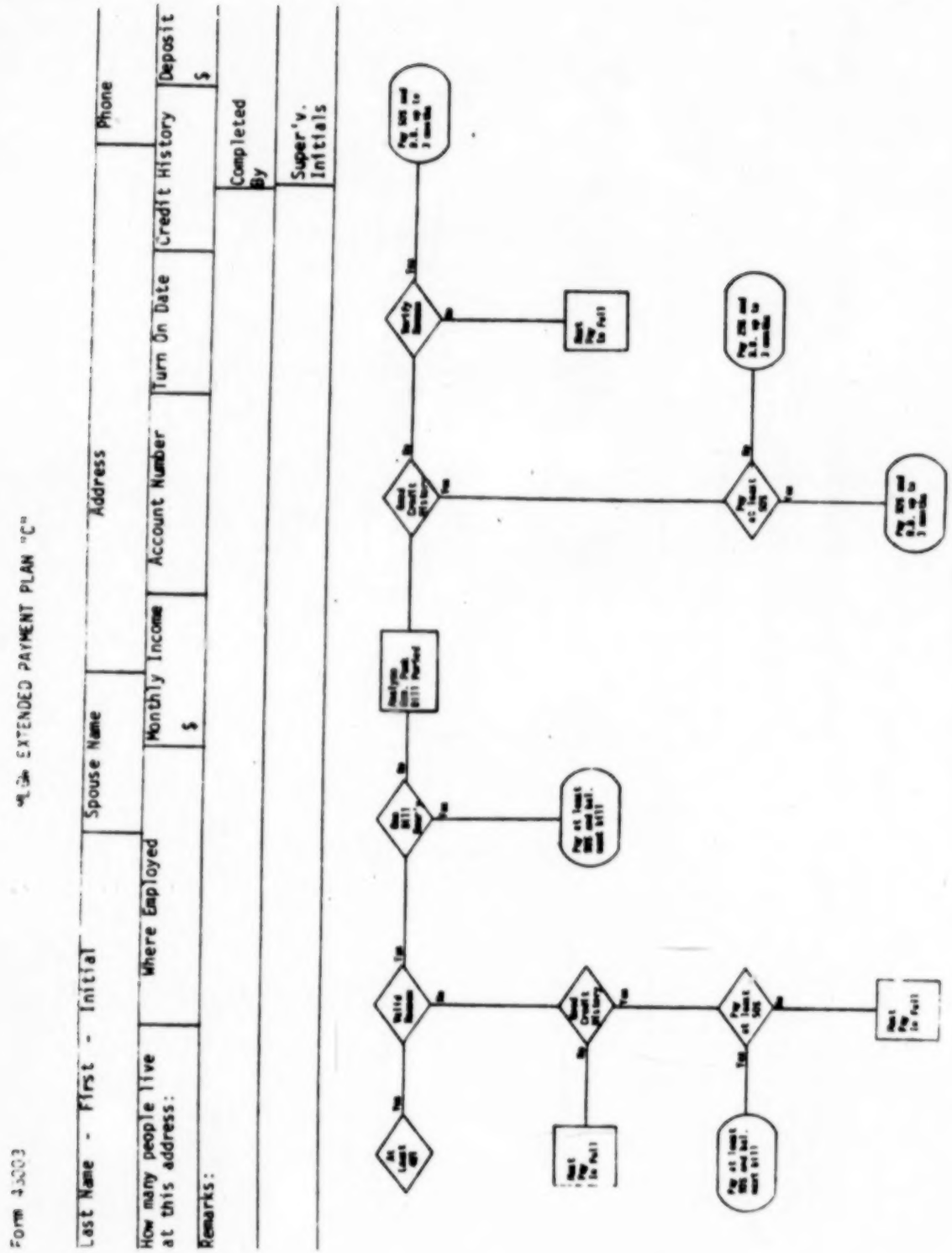


Form 43002

MLGW EXTENDED PAYMENT PLAN "B"

Last Name - First - Initial	Spouse Name	Address	Phone
How many people live at this address:	Where Employed	Monthly Income $	Account Number	Turn On Date	Credit History	Deposit $
Remarks:			Completed By
			Super'v. Initials





EXTENDED PAYMENT PLAN

Use of Citizen Volunteers

Part 3

Purpose

To allow concerned citizens to be active in helping locate hardship conditions and assist in identifying those who need temporary help.

1. Recruit volunteer workers from various organizations and churches to assist in promoting customers that are having financial difficulties, illness, loss of employment, etc., to contact MLGW Credit Department and work out payment arrangements to prevent their utilities being discontinued.
2. These volunteers will be given and informal briefing to familiarize them with our billing and credit policies. The Citizen Volunteers will be versed on ways that may help others to conserve utilities, etc..
3. All training for Citizen Volunteers will emphasize that MLGW is concerned about disconnecting for non-payment of utility bills when it could have been prevented if the customers involved with hardships would come forth with their problems.

(To be implemented in the near future)

EXTENDED PAYMENT PLAN

Community Information Program

Part 4

Purpose

Informative booklets and other communiques including use of the news media to inform customers on ways to save money and energy in daily living by practicing conservatism.

(Our Public Relations Department is presently working on this part and will be implemented in the near future.)

MAIN FACTORS USED IN SETTING UP AN EXTENDED PAYMENT PLAN

1. Number in family (Dependents)
2. Total Monthly Income
3. Reason unable to pay in full (valid or invalid)
4. If financial difficulty is more than one month
5. Projection of average billing for next several months to set up payment plan within customer's financial ability.

To insure that Credit Counselors would be able to differentiate in a fair and equitable manner between a customer with a low income versus another with a larger income, the U. S. Government's statistics were used showing $333.00 as the amount of income per month required to live for a family of four and considered the poverty level.

Using this figure as a base, three separate income levels or "plans" were established that would allow each customer's different circumstances to determine how much help was needed and how long a Credit Counselor could defer a balance. (Exceptions to be approved by Supervisor)

The following schedule is used to determine which plan to use according to the number of dependents and amount of income. (One (1) to four (4) dependents used as base plan with $50.00 added for each additional dependent over four (4))

1 TO 4 DEPENDENTS	PLAN "A" LESS THAN 151	PLAN "B" 151 THRU 400	PLAN "C" AT LEAST 401
NO. DEPEND.			
5	201	450	451
6	251	500	501
7	301	550	551
8	351	600	601
9	401	650	651
10	451	700	701

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

(Title omitted in printing)

AMENDMENT TO ANSWER

(Filed May 23, 1974)

Leave of Court having been obtained, the defendants herein file this amendment to the Answer heretofore filed in this cause so as to include an additional exhibit to the original Answer hereby designated as Exhibit "J".

Respectfully submitted,

E. BRADY BARTUSCH
Attorney for Defendants, Memphis Light, Gas and Water Division

(Certificate of service omitted in printing.)

EXHIBIT J

Annie Sue Fuzzie
968 Leath
01-003-01-105-9

FINAL NOTICE MAILED

11 19 73
12 19 73
1 22 74
2 20 74

Sarah Lee Parker
1191 Coler
003-53 670-4

FINAL NOTICE MAILED

3 21 75
4-19 75
5-19-75
6 20 73

Property at 730 Chelsea purchased by Sylvester Wade and Ida Wade on December 13, 1963, per Tax Assessor's Office February 27, 1974.

Jessie Lee Holmes
730 Chelsea
01 00? 16 870 3

FINAL NOTICE MAILED

11 20-72
2 20-73
3 21 73
4 19 73
5-19-73
6 20 73

Sylvester Wade
730 Chelsea
01 00? 16 870-4

FINAL NOTICE MAILED

8-20-73
9 19 73

Willie C. Craft
1019 Alaska
02 01? 18 660 2

FINAL NOTICE MAILED

8 21 73	11 20-73	2-21-74
9 20 73	12 20-73	3 22 74
10 19 73	1 25 74	4-25 74

EXHIBIT "J"

BEST COPY AVAILABLE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

(Title omitted in printing)

ANSWER TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

(Filed May 3, 1974)

Now comes William T. Mullen, Secretary-Treasurer, Memphis Light, Gas and Water Division, who having been duly sworn, in response to the Interrogatories served upon the defendant by the plaintiffs in the above styled matter, makes the following answers and responses:

Interrogatory No. 2:

What training programs are given to the persons who do the physical termination of a customer's utilities. Are said persons taught to contact the homeowners or occupants prior to termination or are they taught to avoid such contact. If there are written policy statements as to this question of contact, please designate who has a copy of such policy statement and where they are located. Please attach a copy of said policy statements to the answers to these interrogatories if you are willing to do so without a motion to produce. If you are not willing to do so, please give your reasons.

Answers to Interrogatory No. 2:

Employees in the Customer Service Area come from other positions within the Division and are trained in accordance with procedure manual, a copy of which is available to the plaintiffs

at the Memphis Light, Gas and Water Division. Meter Reader is an entry job and is trained in accordance with procedure manual, a copy of which is available at the Memphis Light, Gas and Water Division. See Exhibit No. 2.

Exhibit 2

EXCERPT FROM CUSTOMER ACCOUNTING—
SUPERINTENDENT HENRY MARTIN

February 1, 1972

INSTRUCTIONS FOR HANDLING
DELINQUENT CUT-OFFS

Vacant House (New)—If house is vacant and new, do not cut off, try to find who is the owner or builder. Look for real estate signs in the yard. Put the name of the realtor and phone number on the cut-off ticket. Write on ticket, **Vacant and New.** Use Code No. 1.

Vacant House (Old)—Houses that are vacant and old, cut all services that you can cut off and put the "cut-off" readings on the ticket. Also write on the ticket, **Vacant and Old.**

Vacation—If unable to contact the customer, and you find old newspapers on the porch or steps, grass needs cutting, or any indications that this customer may be out of the city, pass, use Code No. 1, and write on the ticket **Vacation.** (Try to verify with neighbors.)

Illness—If customer claims someone in the house is sick and you are convinced, do not cut. Use Code No. 2 and write on ticket, **Illness.** Tell customer to contact office.

Mail—If customer claims to have mailed a check or money order, question them as to when mailed and the amount. Write the money order number on the cut-off ticket. Write on ticket, **Check or Money Order Mailed,** give date mailed and use Code No. 4.

Paid Receipts—If customer shows you a receipt paid in the office for the amount that appears on your cut-off ticket, pass, and use Code No. 3.

Cut-Offs—If you make contact with the customer ask him if he has paid his bill. If not, state that you have been sent out to disconnect his services until the bill is paid. Leave the customer a door-knocker card filled out in detail and explain to the customer that they can take this card along with his bill, which must be for the same amount as the door-knocker, to a pay station and pay the bill. After he has done this, he may call the office and tell us the bill has been paid and we will send a man out to see the receipt and re-store the services. Write on the cut-off ticket **Notified Customer** (NF). If unable to make contact with the customer, cut off the service and fill out a door-knocker card in detail. Hang the card on the door knob if possible, if not, slip it in crack of door so customer will find it. Never leave the door-knocker in the mail box. Write on ticket, **No Contact** (NC). On all accounts that are cut-off, give the approximate time of cut-off.

Miscellaneous—Be sure the amount on the door-knocker card is the same as the "Notice Amount" on the field ticket. Be sure the account number is correct. Circle the service or services cut and sign each cut-off ticket. If service is cut-off stamp or write **Cut-Off** on ticket.

ONE-SERVICE CUT-OFF MISCELLANEOUS INFORMATION

NSF—Lists number of times during current, previous, and second previous calendar years the customer has given us checks which were returned by the bank due to "no account" or "non-sufficient funds".

NPC—Lists number of times during current, previous, and second previous calendar years the customer has been disconnected by us due to "non-payment of his account".

EXT—Lists number of times during current and previous calendar year the customer has been granted an extension of time in which to pay his bill.

ML—Number of months since last credit extension was granted the customer. **1** through **9** are used for 1 through 9 months, **X** for 10 months, **J** for 11 months, and **K** for 12 months or more.

GENERAL:

O's in these fields indicate no activity. **Blanks** indicate that the customer was not on our lines at that time. Final notice mailing date is normally 4 to 6 working days before the next meter reading date.

EXCERPT
from
CUSTOMER SERVICE AND INFORMATION—
SUPERINTENDENT GENE LAMBERT

Revised April 1, 1972

A Friendly, Courteous and Helpful Attitude Contributes Considerably Toward a Successful Service Call.

Customer's Premises

Courteous Entrance

Courteous entrance into a customer's premises is a must. Knock on door or ring bell and when customer answers, state your name, that you represent the Memphis Light, Gas and Water Division and explain why you are there. Be prepared to show your ID card. When you are invited in, be sure your shoes are clean and remove your rubbers or overshoes if they are being worn.

Turn on and Turn Off

Turn on work presents one of the best opportunities to fulfill our primary objectives of customer safety and satisfaction. Thorough checking of Division facilities and customers' appliances helps to form their first opinion of the Division from your actions. Your appearance and conduct while making the turn on and the condition in which you leave the appliances play a vital part in making good customer relations. Customers should be instructed in the operation of their equipment and controls. The serviceman is to perform any necessary service that falls within the scope of Division Service Policy.

Follow turn on procedures, except in those cases where you find the premises locked and meters show on, then the order may be completed. In these instances the Customer Order Card must be noted "Found On". If any meter or meters are found off, the order card must be noted "Locked".

Turn Off Procedure

Turn off assignments are issued whenever a customer's account is to be closed or transferred to another address. When the gas,

electric and water are being turned off, it is important to avoid errors. The following turn-off procedure is to be followed:

A. Verify order.

1. Correct name and address
2. Correct meter number

B. Turn off meters.

1. Lock and seal gas meter
2. Boot off electric meter and seal
3. Bend seal to indicate meter is booted off
4. Cut off water meter
5. Check and record condition of Division facilities

C. Read meters and complete order

C12-DCO

When C12 (DCO) assignments are issued, the following disconnect procedures will be followed:

A. Verify order.

1. Correct name and address
2. Correct meter number

B. Turn off meter.

1. Lock and seal gas meter
2. Boot off electric meter, install lock rim, barrel lock and seal
3. Bend seal to indicate meter is booted off
4. Cut off water meter
5. Check and record condition of Division facilities

C. Read meter and complete order.

	Non-Completion Codes for Regular Disconnect Orders	
All Services Delinquent C12	CST	60
	Hardship	37
	Locked	10
	Meter Location	57
	Not Accessible (Bad Customer) (Bad Dog) (Disturbance)	41
	Paid Receipt	28
	Payment Mailed	38
	Switched Meter	72
	Investigate Report	99

Interrogatory No. 4:

Define in detail the program set up by the Memphis Light, Gas and Water Division for payment of past due utility bills in installments. If more than one plan is available, please define in detail each plan. If charts are available which further explain the plans, please attach copies to your answers to these interrogatories if you are willing to do so without a motion to product, otherwise designate the person who has copies of such plans.

Answer to Interrogatory No. 4:

See Exhibit No. 4. (This is the same as Exhibit "I" to Answer (previously printed in Appendix.)

Interrogatory No. 5:

When a customer comes to Memphis Light, Gas and Water Division to ask a question about his bill, with whom does he

talk? Please list the job classification of those persons with whom a customer talks and list the requirements a person must meet to secure that position.

Answer to Interrogatory No. 5:

See Exhibit No. 5.

Exhibit 5

JOB DESCRIPTION

TITLE: Credit Counselor

JOB CODE:

DEPARTMENT: Credit and Collections (Area 630)

EFFECTIVE DATE:

RESPONSIBLE TO: Chief Clerk, Credit

PURPOSE: Under supervision, to advise customers on Division's credit policy; to order customer's service connected or disconnected; to grant or refuse credit; and to perform other related duties.

DUTIES AND RESPONSIBILITIES:

1. Discuss delinquent bill problems with customers; grant or refuse credit extensions of unpaid balances.
2. Advise customer as to Division credit policy and assist in working out extended pay plans for customers.
3. Research credit history for various reasons such as to determine customers credit history, to itemize accounts,

to determine customers liability, and to process service orders.

4. Insure that commercial accounts have sufficient deposits and signed contract before approving meter service ticket.
5. Adjust customer's account in accordance with Division policy.
6. Originate connects on released blocked accounts.
7. Advise customers as to how to save on utility bills.
8. Block accounts when investigation shows evidence to do so.
9. Reinstate charge-offs, credits and debits.
10. Prepare listings, records, tickets, reports, etc.
11. Answer telephone, give and receive information, relay messages.
12. Maintain files and records.
13. Perform other related duties as directe

DIRECTION: None

JOB SPECIFICATIONS:

EDUCATION: High school diploma

TRAINING: 1-2 years

OTHER: Must have ability to meet and deal with people.

WORKING ENVIRONMENT: Works inside and outside under good conditions.

Interrogatory No 6:

If a customer after meeting with the persons inquired about above does not get satisfaction, to whom is he referred? List in order all of the people, by job classification, with whom a person may talk concerning a dispute over a bill. As to the highest disputes with their individual bills, list the names and job classifications of each of those employees.

Answer to Interrogatory No. 6:

Glyn Frost, Chief Clerk, Credit; Joe Xiques, Supervisor, Credit and Collection; Frank R. Harty, Superintendent, Credit and Collection. In addition to the foregoing, management at all levels including the Board of Commissioners of the Memphis Light, Gas and Water Division can hear complaints regarding bills, termination of service, or any other matter relating to the operation of the Memphis Light, Gas and Water Division.

Interrogatory No. 7:

Who designates when a final notice before termination is to be sent to a residential customer of the Memphis Light, Gas and Water Division? What criteria are used to determine when those final notices are sent out? Are the notices individually signed or individually checked at the time of mailing to see if the customer's bill has been paid, or are they prepared and mailed by machine?

Answer to Interrogatory No. 7:

1. A policy by the Memphis Light, Gas and Water Board of Commissioners.

2. The criteria used to determine when a final notice is mailed is as follows:

a. If a customer's record indicates one or more disconnects for non-payment in the current year or two or more in the previous year.

b. If a customer's record indicates that a one month's bill with a balance greater than $26.00 is unpaid.

c. If a customer's record indicates he has had service less than twelve months with an unpaid bill greater than $26.00.

d. If a customer's record indicates three or more returned checks in the current or previous year.

3. The computer is programmed to post all payments prior to printing final notices.

a. Notices are not individually signed.

b. The computer is programmed to post all cash payments to customers' accounts prior to printing final notices.

See Exhibit No. 6.

Interrogatory No. 8:

How many residential customers are there of Memphis Light, Gas and Water Division?

Answer to Interrogatory No. 8:

Electric 235,879; Gas 201,806; Water 165,257.

Interrogatory No. 9:

During September, October, November, and December, 1973 and January and February of 1974, how many final notices were sent out to residential customers of Memphis Light, Gas and Water Division? Designate the number sent in each of those months?

Answer to Interrogatory No. 9:

September, 1973	17,111
October, 1973	19,465
November, 1973	17,840
December, 1973	15,540
January, 1974	18,991
February, 1974	17,433
Total	106,380*

* Total includes residential and commercial.

Interrogatory No. 10:

How many people's utilities services were actually terminated during those months? Designate the number of actual terminations in each of the months asked about?

Answer to Interrgatory No. 10:

Month	1 Service Cut Off	Delinquent Cut Off (D.C.O.)
September 1973	2,455	1,641
October 1973	2,909	1,841
November 1973	1,757	1,879
December 1973	1,393	1,791
January 1974	2,226	2,164
February 1974	1,745	1,900
Total	12,485*	11,216*

* The totals of the above cut offs cannot be added together because when an account becomes delinquent, one meter (electric) is disconnected—Four work days later if still unpaid, the other meters are then disconnected. (Delinquent Cut Off—D.C.O.). If an account is granted an extension of time to pay past the one service cut off date and then isn't paid, it would have a delinquent cut off.

Interrogatory No. 11:

Of the terminations mentioned above how many of those were to homes to which no final notice has been sent? How many employees work in the position of an employee who can terminate utilities of residential customers?

Answer to Interrogatory No. 11:

1. None—The computer is programmed to issue all delinquent cut offs from the list of final notices that were previously mailed.

2. There are 27 employees in the Credit and Collection Department that work under procedures that give them the authority to terminate utility services where circumstances such as the following exist:

A. When payment is being used in a ficticious name to prevent payment of an outstanding bill.

B. Service is being used illegally and not in any customer's name.

C. Customer fails to meet prior arrangements to pay outstanding bill.

D. Meters broken and service being used by customer, who refuses to pay bill or make any arrangements on bill.

Interrogatory No. 12:

What is the expressed policy concerning the termination of utilities to residential customers? If there is a copy of that policy in writing, designate what official has said copy. Attach a copy of such policy statement if you are willing to do so without a motion to produce.

Answer to Interrogatory No. 12:

See Exhibit No. 7.

Exhibit No. 7

Water Policy

(Water Policy only printed. Gas and Electric in a similar language.)

7.6 If bill is not paid on or before delinquent date as indicated on final notice, service may be discontinued without further notice to customer and not again resumed until entire bill is paid. Neither the Division nor the City of Memphis shall be liable for damages on account of discontinuing service at any time after delinquent date. If service is discontinued because of failure to pay bill a disconnect charge may be made. The discontinuance of service by the Division for any cause does not release the customer from his obligation to the Division for the payment of bills.

7.7 Any unpaid bills of the customer accruing at any address may be added to any unpaid bill for service contracted for by customer at any other address, and shall take the same status. Any unpaid bill accruing at any address under a contract arranged by any other member of customer's family, living as such, may be added to any unpaid bill for service contracted for by customer and shall take the same status.

Interrogatory No. 13:

Why were two accounts for utilities set up for Mr. and Mrs. Willie S. Craft at 1019 Alaska, Memphis, Tennessee?

Answer to Interrogatory No. 13:

1. Previous tenants were Charlie Hall, connected April 23, 1970 and disconnected August 3, 1972 on account (02)012-18-

660-1, and Ed Fatheree connected February 14, 1969 and disconnected January 5, 1973 on account (02)012-18-622-3.

2. Property sold to Willis and Mary Craft on October 9, 1972 (verified by Shelby County Tax Office).

3. This was a two (2) apartment resident, having two (2) gas, two (2) electric and one (1) water meter. The water meter served the two apartments.

4. One (1) gas and one (1) electric meter connected in name of Willie C. Craft on account number (02)012-18-660-2, October 9, 1972.

5. One (1) gas and one (1) electric meter remained on in name of Ed Fatheree on account number (02)012-18-662-3 until a no pay disconnect was made on January 5, 1973. A final bill in the amount $55.06 remains unpaid.

6. Account number (02)012-18-662-3 was not put in name of Willie C. Craft until June 1973, connect effective January 5, 1973.

7. Request made to Mann Electric Company on October 12, 1973 to combine the two sets of meters to one (1) set. (Plumber was paid by Mann Electric Company.)

8. Gas service was combined from two (2) meters to one (1) meter by Albert Cook Plumbing Company. Work completed on October 23, 1973.

9. Electric service was combined from two (2) meters to one (1) meter by Mann Electric Company. Work completed on October 24, 1973.

10. Mr. and Mrs. Willie C. Craft are now receiving one (1) billing for one (1) gas, one (1) electric, and one (1) water meter.

Dated this the .... day of May, 1974.

WILLIAM T. MULLEN
Secretary-Treasurer, Memphis Light,
Gas and Water Division

State of Tennessee }
County of Shelby }

William T. Mullen, being duly sworn upon his oath, deposes and says: I am the Secretary-Treasurer of the Memphis Light, Gas and Water Division, defendant in the above styled action, and have read the Interrogatories served upon the defendants by plaintiffs, and the foregoing Answers to those Interrogatories are true according to the best of my knowledge, information and belief.

WILLIAM T. MULLEN

Subscribed and sworn to and acknowledged before me by William T. Mullen, Secretary-Treasurer, Memphis Light, Gas and Water Division, Defendant, on this ... day of May, 1974.

.....
Notary Public

My Commission Expires: .....

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

(Title omitted in printing)

ANSWER TO PLAINTIFFS' SECOND SET OF INTERROGATORIES

(Filed September 12, 1974)

Interrogatory No. 9:

During the months of September, October, November and December of 1973 and January and February of 1974 how many customers utility services were terminated by mistake?

Answer to Interrogatory No. 9:

Very insignificant percentage.

The Opinion of the Court of Appeals was printed as Appendix "A" in the Petition for Certiorari.

The Opinion of the District Court and its **Order** were printed as Appendix "B" in the Petition for Certiorari.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

(Title omitted in printing)

The following testimony of Patricia Pintchuck, given in the proceedings on request for Temporary Restraining Order, beginning at approximately 1:30 P.M., Tuesday, March 5, 1974, in the United States District Court, Memphis, Tennessee, before the Honorable Harry W. Wellford, Judge.

Appearances:

For the Plaintiff:

The Honorable H. Phillip Arnold,

The Honorable Thomas M. Daniel.

For the Defendants:

The Honorable Brady Bartusch.

[*3] **PATRICIA PINTCHUCK,**
the said witness, having been first duly sworn, testified as follows:

Direct Examination, by Mr. Daniel

Q. Would you stte your name, please, ma' am? A. Patricia Pintchuck.

Q. All right.

* * * * * * * *

[4] Q. Mrs. Pintchuck, you received a bill in January for fifty-eight dollars twenty-two cents, I believe? A. Yes, sir.

---

* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

Q. Now, all right.

Now, did you pay that bill? A. Yes, sir.

[5] Q. When did you pay that? A. January the 30th.

Q. All right.

And then in February of this year, what bills did you receive from Memphis Light, Gas & Water? A. One hundred seventy-eight dollars and thirty-four cents.

Q. All right.

Do you have any explanation as to why the bill was that high? A. Well, I moved onto, into this duplex in August, and at that time, I had my utilities cut off, supposedly, at my previous address, and they didn't do it. They left them, and—— (interrupted)

Q. You mean you requested Memphis Light, Gas & Water —— (interrupted) A. Well, they transferred.

Q. (continuing) ——to transfer your utilities, and they didn't do it? A. Uh-huh.

Q. All right.

Did they come out and read the meter at your old address —— (interrupted) A. Well, finally.

Q. (continuing) ——while you were there? [6] A. No.

Q. All right.

And how much was the bill outstanding from this old address? A. Well, it finally came to about eighty-five dollars and thirty-four cents, I believe.

Q. All right.

Did you feel that you owed that much? A. No.

Q. All right.

You felt that part of that billing was for utilities which had been used after you left there? A. Uh-huh.

Q. All right.

Now, is there any explanation on the new bill that this one hundred seventy-eight dollars might include part of the ninety-five dollars bill? A. No. It says, "service address" and has my home address.

Q. All right.

Have your utilities been terminated since you received this bill? A. I received this bill and I was going to, I called them and said:

"There must be some mistake."

[7] I figured they would just put a "one" there by mistake.

They said they would check into it and I didn't receive any further word, and then Friday they came out to cut off my utilities. I did not get a final notice and I had been looking for one with a bill like that, and I didn't receive a final notice. The man came out to turn them off. I told her (him), my daughter was sick and she had the flu for a week, and they just couldn't do it, and he did not, didn't.

Q. All right.

Have they failed to cut—have they cut off your utilities since? A. No, sir.

Q. You have worked out the dispute? A. With that, too, with that bill due, which that bill, twenty-one dollars thirty-nine cents for the month of January that I have to pay, and the other bill, I have been playing kind of ring-around-the-roses with them, going from one person to the other.

Q. Trying to work out some arrangement on the bill? A. Uh-huh.

Mr. Daniel: You may ask.

[8] **Cross-Examination,** by Mr. Bartusch

Q. Mrs. Pintchuck, where do you live? A. Thirty-five ninety-nine Powell.

Q. Thirty-five ninety-nine Powell? A. Yes, sir, right here (indicating).

Q. And how long have you lived at that address? A. Since August.

Q. And you lived there by yourself? A. With my daughter.

Q. And where did you live before that? A. Thirty fifty-six Waynoka.

Q. Now, did I understand you correctly when you said after your services were terminated, you explained your problem with your children with someone—— (interrupted) A. Uh-huh.

Q. (continuing) ——from the division? A. Well, after, oh, when the man came out on Friday——

Q. Yes. A. And I told him that my daughter was sick. I know the division don't usually make a practice of cutting off where there is a sick child in the house.

Q. So, what did they do? A. Left them on.

* * * * * * *

The following proceedings were had in the United States District Court, Western District of Tennessee, in Memphis, Tennessee, beginning on Wednesday, September 25, 1974, at 10:41 A.M., before the Honorable Harry W. Wellford, Judge:

Appearances:

For the Plaintiffs:

The Honorable Thomas M. Daniel

The Honorable G. Philip Arnold

For the Defendant:

The Honorable E. Brady Bartusch

[16] MARY CRAFT,

the said witness, having been first duly sworn, testified as follows:

Direct Examination, by Mr. Arnold

Q. Mrs. Craft, state your name and address to the Court, please. A. My name is Mary Craft. I live, 1019 Alaska.

Q. And you'll need to speak up because we all want to hear you. A. My name is Mary Craft. I live, lives 1019 Alaska.

Q. And your husband's name? A. Willie S. Craft.

Q. Mrs. Craft, will you describe when, when did you move into the home at 1019 Alaska? A. October, last October.

Q. Would that be October of 1973? A. Yes, yes, sir.

Q. Is that right? Or October of 1972? A. That will be two years in October, '72, what is this, '74?

Q. This is '74. A. Seventy-two.

Q. Mrs. Craft, would you briefly describe your **[17]** home there, please, the layout of the rooms, and how many rooms there are. A. I have four bedrooms, two baths, kitchen, den and three porches, front, back and side.

Q. Did you know any of the previous people who lived there at that address before you moved in? A. Nobody. I don't know anybody.

Q. Did you know a Mr. Ed Fatheree, F-a-t-h-e-r-e-e? A. No, I didn't.

Q. Mrs. Craft, after you moved in, did you contact the Memphis Light, Gas & Water concerning your utilities? A. I did before I moved. I called them and asked them to transfer the water, gas and lights to Willie S. Craft.

Q. You had things in your house that used all three of those utilities? A. Yes.

Q. Gas fixtures and, as well as furnaces? A. Yes, sir.

Q. The luxuries? A. My furnace is a luxury.

Q. When did you first begin having some difficulty with your utility bill? A. It was in June, a man came out there to read the meters and he read the meter and I was out, out **[18]** in the yard, doing some other things, and he called me and said:

"Do you know you ain't paying, no water bill?"

I said:

"No, I ain't paid no **tention** (attention) to it."

And he said:

"There is no water bill on this."

And I said:

"What must I do?"

And so he gave me a number and told me to go in the house and call Gas & Light, and I went on and he was standing outside in the yard, in the front, I went on in and called later and she answered the phone, and I told her, and she said: "Okay."

Q. Which lady was this? A. I don't know, because I was on the phone, she was at the Gas & Water, some lady at the Light,

Gas & Water, some lady in the department, and I told her I didn't have no water on my bill, and she said:

"Okay, we'll put it on."

And so, I went on and still never paid no attention to it, working, I didn't pay any attention, still they hadn't put it on there because I thought **[19]** they put it on there when I paid for it.

Q. Up until June, 1973, had your utilities ever been terminated for anytime, or had they ever been cut off, any of them, light, gas and water? A. Well, in June.

Q. Up until the time you are talking about, had they ever been cut off at anytime? A. No, they hadn't been.

Q. All right. What happened after that in terms of any difficulties with your light bill or gas bill, water bill? A. I was working and, along about eleven o'clock my daughter came out on the job where I was working at and says:

"Do you know they done come out there and got the water meter?"

I said:

"What for?"

And she said:

"I don't know."

Q. When was this, Mrs. Craft? A. Was in June, it was in June or July, I believe it was in the last part of June they come out there and got that water meter, somewhere along there. I disremember, but somewhere along there.

[20] Q. What did you do then? A. I called, went to the office I was working at and called them and asked them, and I talked with somebody and they said they would see about getting it back out there. I tried to find out what they take it out, what it was about, so the next day I gotten off and went down there. I went down soon in the morning, was down there before they

got, got the doors open. I sit there until around five o'clock that whole day trying to find out what was the matter, got the water meter.

Q. How many people did you talk with, Mrs. Craft? A. I don't just exactly remember, just about everyone, and I think I got to talk with one man and they are just walking and talking and walking and talking, they never could give me no answer.

Well, the next day I went back again, and I asked the lady, I said:

"If you just tell me I have to pay for the water meter or give me some explanation or what to do. I'm working, I can't pay it all at once, but I will pay for it."

But he still didn't give me, and said:

"We put one in. We puts one in."

[21] And it was a week before I got one in, and I had to talk about, talk, call the health department and everyone, I think, before they come back and put one in. I was a solid week with no water and thirteen people in the house.

Q. These are all members of your family you are talking about? A. Yes, sir.

Q. Thirteen members of the family, live, living in your home? A. Yes, sir, that is right, because I had ten children of my own.

Q. And, as you remember, that was in July? A. I think it was in July. I know it was hot. It was in July, I believe, because it was in June, I think, when that man, when he told me about the water wasn't on.

Q. What did you do for water during this week, Mrs. Craft? A. One of the neighbors up the street was a friend to my children, little girl, she got them to come and told them they could get water up there, and let us wash up there on time, and I really don't know her name, because I was working and trying to hold my job, and I don't know what their name was,

but I thanked **[22]** them, offered them something of what I had to give them.

Q. Did you finally work out some way, this problem, or how did you get water back in our house? A. I went to the man I bought the place, the house from, and I told him, I said:

"Do you know I hadn't got no water out there?"

And I said;

"I have called and done and called and done an called."

And so he told his next man, his man that worked on the place there with them, out there, well, he say:

"I want you to call up there for the gas and light and see if they can, couldn't do something about this for . . ." (pause)

Q. Water? A. "Water."

They, see if they didn't, can't get me some water. He said:

"They can't do without water as hot as it is".

And he got on the phone and called them and she told him just like she did me, they were going to bring one out there. **[23]** When I got home there was no water there.

Q. But after a week you had a water meter installed, is that right? A. After a week somebody had brought me a meter out there and put it in, and my children called me and said somebody done come and put a meter in.

Q. All right. A. And that is all I know, they would cut it off and I wouldn't see them.

Q. Then, then did things work out all right after that, Mrs. Craft? A. If they didn't, wasn't trying to bill me with two, it was two meters at the house, and one of the meters were locked up.

Q. Two of what kind of meters? A. Gas meter, it was two light meters.

Q. Now, what kind of meter was locked? A. One of the gas meters was supposed to be locked, and I wasn't supposed to be using but one light meter, that was my understanding.

Q. Did you see the locked meter? A. Yes, sir. I asked him, one of the men out there, I said:

"This gas s'pose to be locked."

He said:

[34] "It was locked."

I said:

"What about the light?"

I said:

"It's s'pose to be locked."

I said:

"I don't need but one gas meter and I don't need but one gas line through here, and he said it was locked off."

Well, when I get a bill, I get a bill for it, both of the meters, gas meter and both of the light meters.

Q. You talked about the size of your house earlier, Mrs. Craft. Is there an apartment in your house? A. No apartment there, as I know of.

Q. Has there ever been an apartment there? A. Well, I wouldn't know. I didn't buy it for no apartment. I bought it for a residence, for a home. That is all I can tell you, because the apartment part, I don't know anything about.

Q. And all of you, although it is a large family, all of you, a large family, there? A. Everything there is mine, children, grandchildren, they are all mine.

Q. Did you have, ever have any other utilities cut **[25]** off? A. What you mean?

Q. Did you ever have the water cut off or was the gas or electricity cut off after this water meter was out a week? A.

Yes. It was for a good while, somebody would come out there, and I would, I was, would, I still be paid, paying on the meter that I thought I was s'pose to pay on, see, I would pay that every month, and then I would pay so much on that, and then send, they send out another bill on it. You got the bill there, see on, on a bill on the other there, you see, and cross bill me, and then I went to the credit department and I, I went there and I seen them, and I told them, my back water, if I have to pay, pick this up, and if they tell me what it is, and I'll pay, and one of the ladies said:

"Oh, it ain't going to be, to be more than about forty dollars."

And when the bill come out, it was one hundred dollars, and I got down there——(interrupted)

Q. Mrs. Craft, you gave me your bill and I have the original here on the table, and we have made copies of them, and I would like for you to look at these and identify them as to whether these are copies of your **[26]** bills, or not.

(Passes instruments to the witness) A. Yes.

Q. You look at all of the pages, and see if those are copies of the bills you sent me. A. Yes, sir, they are.

Mr. Arnold: All right.

Your Honor, that was identification exhibit marked 1(a) (b) (c) and (d).

The Court: All right, sir.

By Mr. Arnold:

Q. Are these, the figures, the same, if you know, as Exhibit (a) to the amended answer? A. Yes, sir, I do know.

Q. And the figures are the same, are they not? A. They are. They are.

Mr. Arnold: Three or four months, which Mrs. Craft's bills, she didn't have those, and so we don't have those to corroborate,

but these are all the same as the ones we have had copies of. I have checked those out.

The Court: So, what you are saying is that insofar as you have copies, the figures indicated on Exhibits (a) to the amended answer are correct, and on the others, you simply don't **[27]** have copies, and, therefore, cannot say whether they are or are not?

Mr. Arnold: That is correct.

The Court: All right, sir.
You may proceed.

Mr. Arnold: I believe we have agreed that after identification of our exhibits, they will be admitted into evidence?

The Court: Yes, sir. This, without objection, will be admitted.

(Whereupon, the said exhibits previously marked Exhibit 1 (a) (b) (c) and (d) for identification were received in evidence.)

Mr. Arnold: That is a part of the pretrial order.

The Court: Number what, Mr. Clerk?

The Clerk: One (a) through One (d).

The Court: All right.

By Mr. Arnold:

Q. Now, did you have gas electricity or water cut off again after that week in July, Mrs. Craft? A. Yes, sir.

A man came out there and cut it off and went on. I went down there and carried my slip, what I had been paying on, and then they turned around and said:

[28] "Well, you have to pay on the other."

Q. Did you see the man when he came out to cut off your gas? A. Nope. If he had come to the door and said something to me, I would have showed him that number, what I paid on,

and the other, you know, the gas meter, that I thought I was done paying on. You see, when I had to go there, see, and I called them to come down there, I went down to talk with them, and, well, they said I have to pay on the other, that was for the other, well, they come right back and turned it back on.

Q. How many times was your gas or electricity or water cut off altogether, Mrs. Craft? A. About four or five times, until I got in touch with you all.

Just keep a cutting them off, and I don't, did not know it.

Q. Did you ever see the man, did he ever come to the door and say, 'Mrs. Craft, I have come to cut off the gas.'? A. No, he would always cut it off and wouldn't nobody know, because somebody at my house all the time, I works, but my, I have children and grandchildren and somebody at my house all the time, and I would **[29]** always keep the tab where they could get it, and if he come out there, happened to come out and asked about it, see.

Q. Did he leave a note telling you that he had cut off your gas? A. Well, if he left it, I didn't see it and they were there in the house, didn't nobody see it, wasn't in the mailbox.

Q. What about on the door? A. Nobody, ain't, wasn't on the door, nobody. Do, I would have seen it when I come in.

Q. Did you ever see anybody who was coming off to cut off the gas and stop and talk to them? A. I talked to a lot of them. They come out there, the men that was reading, reading the meter, then, I guess he was doing the cutting off, that is the way I understood it, because I talked to a lot of them, tried to find out what in the world was they doing, what was they doing it for when they were making me pay back, a back charge, and bill on it, or whatever you call it, and one, one time I called in, and I got one, and I say I got one bill and I got a back bill, and I would call in, and they say:

"Well, it wasn't none of our doing."

So, they hang up and go on. That was what I was **[30]** trying to find out, what was I paying so much for, because I was working, that is all I was doing, really, was paying the light bill, all, because I could be staying in the house. I was working, it was, that was all I was doing.

Q. All right. A. That was all I was doing. My husband working, paying the bills, and I was working, paying, I was paying the light bill.

Q. How many days, or how many times did you spend, how many times did you go to town, down to the Light, Gas & Water Division and talk with them? A. I don't know. I don't know. I know three times I went down and stayed all day long.

Q. Were these work days? A. Sho' was work days.

Q. Did you take off from work, Mrs. Craft? A. Sure, I had to take off.

Q. Where you are presently employed, what were you doing there, Mrs. Craft? A. Maid, maid. I was a maid.

Q. And how much were you earning per day? A. I make around fifteen dollars a day.

Q. And you missed three days? A. Yes, sir, three or four, somewhere along there.

[31] Q. And for the time you spent at Light, Gas & Water—— A. Yes, sir.

Q. Now, tell me about what happened those three days when you went down? Who did you talk with? A. I wish I knew.

Q. Well, can you, was there anyway you could know who you were talking with? Did they give you their names? A. No.

Q. Did anybody ever give you——(interrupted) A. Everyone.

Q. (continuing) ——his or her name. A. One lady, since we come to Court. I went down there, they come out there that

morning, and I come up there, and they come out there and cut off torectly after I got back, gas, and come out and cut and picked up the old meter that I had changed. They worried me so bad that I asked them what about having the meter changed, and so I——(interrupted)

Q. All right. A. (continuing) ——and so I had the gas and light meter changed. It was two up there, and I had them changed.

Q. When did you have the meters changed, Mrs. Craft? A. I think it was last year in October when the meter **[32]** was changed.

Q. And did Light, Gas & Water change those meters? A. No.

Q. Who changed those meters? A. **Electricity** (electrician) by the name of—What is the man's name, Herman Emmons Manus.

Q. And what was the cost to you, Mrs. Craft, to change those? A. One hundred for the meter and fifty-two twenty for the light meter, I think that is the way it was, either one of them, gas or light one, because I paid one hundred fifty-six dollars and twenty cents.

Q. Total to change that? A. To have those changed.

Then I called the light and gas and asked them what must I do with the meter. They told me to change them each there, and the man hung the, them up there on the thing, hung the gas for me.

Q. That was in October, after October, '73, did you get any more double bills, Mrs. Craft? A. Yes, sir, I got a couple more double bills.

They still tried to bill me and I went down and told them I had it changed and it had, the lady, I talked with the first time, I went down there after that, the lady I talked with, she said:

[33] "Well, it is a back bill and you have to pay it."

And I said:

"All right."

Was never——

"You make it out, I'll pay it on, you know, when I can, I can't pay it all at once."

It was one hundred and something, the bill was, that was one hundred and something they had, and I said:

"All right. I'll pay it when I can, and pay it on time."

And that is the way I do it. I pay it. They come out there and cut off this thing, I come up, out there, and that morning, and they cut off something, and I went down there, this lady I met, I believe this lady was Willor, she was the only one that gave me her name. She looked at the bills and said:

"Hum."

Said:

"You have been paying a lot of, heap of money here."

Said:

"You ought to see somebody about it."

[34] And she gave me a little piece of paper, and there——(interrupted)

Q. Mrs. Craft, I would like to ask you if you can identify this note (passing instrument to the witness) A. Yes, sir, this is it.

Q. Now, what did the lady tell you? This is an employee down at Light, Gas & Water, is that correct? A. Yes, sir.

Q. And what did she tell you? A. She said:

"Who been, what you . . ."

She said:

"Who been fixing this bill for you?"

I said:

"I don't know. Somebody in the credit department there."

And she said:

"Look here."

and went on back down in there and talked to the lady and she come back up and give me that and told me to go to, up to, well, see, this room here, 607, to see about it. She said they're supposed to do something about your bills and things, the way you have been paying, and I thanked her and went on, and I never got to see her no more than, when I went back down there, **[35]** never could get to talk with her no more.

Q. All right.

Mr. Arnold: Your Honor, this is, shows the city, I'm not certain, service department, department one twenty-five, North Main, service 607, Room 607, I would like to have this marked as an exhibit and entered into evidence by Mrs. Craft, this being a note she was given by the employee of Memphis Light, Gas & Water.

The Court: No objection?

Mr. Bartusch: No objection.

The Court: Let it be introduced.

The Clerk: Exhibit Number twenty-three.

The Court: All right, sir.

(Whereupon, the said instrument was accordingly marked Exhibit number twenty-three and received in evidence.

By Mr. Arnold:

Q. Mrs. Craft, how many other places were you referred to other than this one? A. This is the onliest one I got to talk to me, showed me any kind of respect, what I was doing, the rest of them, I just didn't get no sense. I called one night, the water

was off, and some lady **cussed** (cursed) me out on the phone. I don't know who she was.

[36] Q. Did you ever talk with a Glenn Frost? A. Did I? I don't know, and I tried to get to talk with some of the bosses, though I never knew who you, who I talked, because they never give me the name, just talk and walk and talk.

Q. What about a Joe Xiques?

What about Joe Xiques or Frank Harty? A. I don't remember talking to none of them.

Q. Did you ever talk with anybody on the Board of Commissioners of the Memphis Light, Gas & Water Division? A. If I did, I don't know who I was talking to.

Q. Were you ever referred to any of those people by anyone you talked to, did they ever say you can go see them? A. No, I went down there and asked could I talk with some of them, and they never, never give me no answer.

Q. Mrs. Craft, since the, since this, since this lawsuit has been filed, what problem have you had? A. Well, I gets a straight light bill with no, narry, no other one tacked to it. It has been nice. The man comes and reads the meter and goes on, and light bill comes out like it's s'posed to come out.

Mr. Arnold: One moment, please, Your Honor.

The Court: Yes, sir.

[37] Mr. Arnold: That is all, Your Honor.

The Court: All right, Mr. Bartusch.

Cross-Examination, by Mr. Bartusch

Q. Mrs. Craft, as I understand your testimony, did you say that you moved in this house in October of '72, is that correct? A. Yes, sir.

Q. I'm sorry. That is correct, is it not? A. Yes, sir.

Q. Now, now, what kind of house is that, Mrs. Craft? Is it a big house or small house or just what type house is it? A. It is a big house, four bedrooms, kitchen, den, dining, two baths, three porches.

Q. How many people that moved in that house with you, Mrs. Craft? A. My husband and my children.

Q. Well, how many people are there? A. Oh, well, it is about thirteen of them.

Q. Thirteen of you? A. That is about right.

Q. Fairly good size house, isn't it? A. What's you say?

Q. It is a fairly good size house, isn't it? **[38]** A. Yes, sir, it is a big family house.

Q. Right. A. That is what I would call a family house.

Q. Now, Mrs. Craft, isn't it a fact that house is, would, would normally be called a duplex or was a duplex? A. Well, I couldn't tell you. I bought it from the real estate, when I bought it, I bought it for a home. That is the understood, understanding I had. I was surprised when I got there and seen the two meters.

Q. Do you know what a duplex is? You know what I'm talking about? A. No, I don't know what you are talking about when you talking about a duplex.

Q. Well, Mrs. Craft, I think your counsel will agree with me, a duplex is normally one structure, one house partitioned, and two families live in it, one on one side perhaps and one on the other side. That is what we normally, I think, would refer to as a duplex.

Now, was this house, did it, did that fit that description? A. No.

Q. Just one big house with all of the rooms together? A. That is right. No partition at all, at all. I got **[39]** it from, for, I've got a back door on it, no two doors or nothing.

Q. I see.

And you don't know how it was utilized before you bought it, you say? A. No, I don't know anything about it, because I lived way out North Memphis when I bought it, South Memphis, I mean.

Q. Now, when you refer in your complaint, the paper you filed in Court here, Mrs. Craft, to "double billing", I think is the phraseology used.

Now, what, what do you mean by "double billing"? A. The way I could say it, they wouldn't never tell me, I don't know, they had the bills on both of the meters. I don't know why the man or woman or whoever stayed there, somebody didn't pay a bill whatsoever, whoever stayed there didn't pay the bill.

Q. Now, are you saying, then, by "double billing", that they billed you twice on one amount of gas and one amount of electricity? A. Well, the way I understood it, and I understood and tried to get out of the gas and light down there, the lady, the lady that I talked to, the way they talked, like that the gas was coming off of both meters, and I want to know, to know here, how could it **[40]** come off of both meters when, when it's s'posed to be locked up, the way I understand. I pay on one meter, one locked up, and next month, the next morning, the way I was understanding it, they sent me two bills.

Q. They send you two bills, is that right, send you two bills? A. One was for the gas bills, for gas and electricity on one meter, and one, one was the gas and electricity on another meter. That is correct, one was gas, lights and water on one that I, after I got the water straight, and the other was for gas and electricity, I believe that is the way.

Q. And you had one water and two bills for gas and electricity? Right? A. Uh-huh.

Q. Okay. So, I take it by that, then, you're not saying you were charged twice for the same consumption? In other words, you weren't charged twice for the gas? A. Well, I must have been. I couldn't see no other way I was doing it.

Q. Well, could it have been possible that it was being metered, was, meter was being utilized in one section of the house and another meter in another section of the house, and what you utilized here was being read on one meter and what you utilized here was **[41]** being read on another meter? Did you ever consider that? A. I wouldn't know how they had it fixed. I went down there to try to get some sense in it, you know, I don't know nothing about meters. I was just trying to get some sense, how was the gas running, which way was it running?

Q. Wasn't, was there a period of time that you didn't pay any water bill at all? A. Yes.

Q. When was that, do you recall? A. When the man reminded me of it, comes out there, he was in, he was mighty nice, he was tall, I never did get to see him no more. It was in June, I believe. It was in June, he told me, he said, you know, they hadn't got no water on here, and I asked him, and he told me what was the matter, he told me to call, told me to call this **meter** (number), and I told him I would, and he never would put it over.

Q. Who was Mr. Smith—I mean, who was the man you are talking about? A. I never did know.

Q. He was an employee? A. In the, in the, he worked for 'Light, Gas & Water. He was reading the water meter, and I inquire and he **[42]** told me, I, I don't know it, called the Light, Gas & Water, and asked her would she transfer the water, the gas and lights, and she told me she would. I don't know who she was.

Q. Now, when you bought this house, Mrs. Craft, were you told that it was light, gas and water services to two common, I

mean two meters. two meter services for you? A. (nods head in the negative)

Q. Where did you get the idea that it was the responsibility of the Light. Gas & Water to combine the meter services at this p[illegible]? A. Meter services?

Q. Well, I'll put it this way—get all of your services on one meter, disconnect the others, do whatever things you said the man, the electrician, and whatever the plumbing company did to combine the services, so that it came off, through one meter that eventually happened, did it not? A. Yes, sir.

Q. Now, all right.

Now, you made some reference as to the cost of yours, that you expended in getting that done, one hundred fifty dollars, something like that? A. Uh-huh.

[43] Q. Did you say? A. Yes, sir.

Q. And are you saying that is the responsibility of the Light, Gas & Water? A. I'm not saying it is the responsibility of nobody, but I tried to go down there and explain, get them to explain, to find out how did it go, who was responsible and everything from it. I don't know who is responsible for it, I just know what I done and know what they done.

Q. Now, now, how long did you wait, you mentioned something about a period of time without any meter, I think you said about seven or eight days, something like that? A. Yes, sir, that is right.

Q. Where did you, you couldn't, couldn't you go down there sooner to the division, why, what took so long? Did you go down there immediately or did you wait a few days or what? A. I was at work when she called me. It was about twelve o'clock. I got off the next day. I went down there the next morning. I was down there before they opened the next morning. I was down there. I went right the next day. I stayed

down there two days trying to figure out what happened, how come them to **[44]** take the water meter out. The water meter, what caused them to take the water meter. They hadn't never give me no reason what caused it, to take it out, because I was **sturdily** (steadily) paying on one, the one, and I thought I was through, through paying on it, see, if somebody had, down there, had given me a reason about the two meters there, because I didn't know until, I be down there, when, when I moved, I didn't look out there and see there are two meters. I talked to the man. He said they had theirs cut off. They are not using, said somebody was renting the apartment or something.

Q. All right.

Now, you indicated that they were being utilized for an apartment, and the man that you bought the house from said, said:

"Don't worry about it, Mrs. Craft."

right, or words to that effect? A. I didn't know they paid two meters. This is a family water house. He said:

"Well, they're cut off. You don't have to worry about it."

Q. Right. That was the man that sold you the property, right? A. Yes, sir.

[45] Q. Now, did you get any bills from the Light, Gas & Water? I'm not being facetious about this, did you get monthly bills from Light, Gas & Water on your account? A. Sure.

Q. Okay.

Did you get any type of notice that, in the mail, that, or otherwise, that they were going to terminate your——(interrupted) A. If I had, I would have knowed it, and would have tried to do something about it. When I knowed it, all of this had happened, they, see, they didn't send me no notice, notification, whatever, whatsoever. I wasn't notified, no notice, nothing about what happened, about the water, if the man don't tell me, I wouldn't have knowed.

Q. Okay.

Mrs. Craft, you are saying you got all of your bills, but, but you didn't get any termination notice? A. No. I hadn't gotten no notification, didn't get no termination.

Q. All right.

And I think you indicated that you worked everyday? A. (nods head in the affirmative)

Q. But then you further indicated that if somebody, **[46]** if a person from the division had come out, you would have been there to assist them; is that right? A. Somebody was there. I had a daughter there all the time.

Q. I'm sorry. You had a daughter there? A. Daughter there all the time.

Q. What age? A. She is grown.

Q. Grown? A. Got grown children, twenty-four years old. She is grown.

Q. She is grown? A. Yes, sir, I have grown children there.

Q. Now, do you have any idea who you talked to at all at the division? You mentioned one man about a few minutes ago, and then you mentioned a lady down there, and I was just wondering if you had any idea who these people were? A. No, I don't, don't, because i, if I, if they had represented to me who they were, I would have, could have called them and gone down there, and maybe they could have helped me with it, because the rest of the people, they wouldn't give me no kind of answers, but one man and lady.

Q. Mrs. Craft, in your complaint you indicated that **[47]** you, that you, you say, on one occasion when Mrs. Craft stopped a person in her home, who was responsible for terminating her utilities, and called an employee at Memphis Gas & Water, and, to inquire, and you say:

"She was met with the response of: 'pay it again'."

Is that something that you say? Is that something that you thought? A. No, there wasn't no thought, they say it.

Q. Did you get her name? A. I sho' didn't. I wish I had.

So, I went down there to try to find out. I talked to them on the phone. They **cussed** (cursed) me out. So, but, see, I don't go down there to start no racket. I was, I went to, to see, to take care of this.

Q. Somebody cursed you? A. Yes, sir.

Q. Used foul language? A. Yes, sir, she did.

Q. And you didn't get her name? A. No, sir.

Q. You didn't get the name or anything? A. How could I get the name? I called them. I asked **[48]** would they please come out and turn the lights on and I wanted to cook supper, and the gas, and they turned it off when I was not home, and I called when I was home, and, again, about 9:30 and that is when she **cussed** (cursed) me out.

Q. And you say that piece of paper that Mr. Arnold showed to you, that you introduced as some notes that somebody gave you, you don't know who that was either? A. No, I don't know who that lady was.

Q. Well, what did you do when you got the note? A. I think in the—I showed her where I had paid them and went on out and come on home.

Q. I mean, what did you do with the note, the note, didn't you, did you follow what the note said to do or anything, do you know what the note said? A. Yes.

Q. Did you do what the note said do? A. What, yes, sir. I brought the note, I gave it to him.

Q. You gave it to your lawyer? A. Yes, sir.

Q. Okay. You didn't follow the instructions that you were given, that were given you at the division? A. No, I did not know anything about that place, and **[49]** I—— (interrupted)

Q. Okay.

Now, are you familiar with a plan that is generally called the extended payment plan, Mrs. Craft, or a plan that the division has for helping you in paying your back bills? A. Well, that is what they called themselves telling me when I, when I, I went back there. Well, that is what I was calling myself paying on, all that money that I was paying out, that is what I was paying on, on something, I didn't know what I was paying, see.

Q. Well, in other words, some explanation was made to you about this plan, is that right, you're on the plan now? A. Well, it just said go to the credit union and they just told me, asked me how much could I pay on it, and just like that, and I tell them how much I was able to pay every two weeks, and, week, every week, I could pay and put it down, you see, how the bills are, the bills are that they're all messed up and mixed up. You can't tell nothing about the way they are messed up and marked. I don't hardly know where I was paying and how I was paying this, but that is what I was trying to do.

Q. But they did make some sort of adjustment, adjustment **[50]** for you to pay, what was it, twenty-five dollars a month, something like that? A. Yes, sir.

Q. Okay.

Now, have you had, since you got your meters combined into a single meter, you understand what I'm talking about, got one meter now? A. Yes, sir.

Q. Have you had the problem with the service that you say you had before? A. (Nods head in the negative)

Q. Huh? A. Sho' hadn't.

Q. So it was a combination of the meters that really took care of your problem? A. I guess that is what it was, but looked like to me they could have explained to me and told me what it was, and how it was, and if they'd made, explained, I would have knowed something about it, and I would have understood, see, paying out all of that kind of money, I wouldn't know, know what I was paying out all of that kind of money for.

Q. Yes, ma'am. But you were relying on what the man told you when you bought the house through him, when you bought the house from this man? **[51]** A. Yes, sir, that is what he told me. It was, I thought it was locked up, and which it was locked up. He said it was locked off.

Mr. Bartusch: Excuse me just a minute.

The Court: All right, sir.

Mr. Bartusch: I think that is all I have of this witness.

The Court: All right, anything further?

Mr. Arnold: Yes, sir, Your Honor, a few questions on redirect.

Redirect Examination, by Mr. Arnold

Q. Mrs. Craft, how many kitchens in your house? A. It wasn't, ain't but one kitchen.

Q. Is there any evidence of any other kitchen in that house at all? A. Yes. I got a back room. It is a sink in it, and some cabinets back there, looks like somebody might have used it for a kitchen long time ago, something like that. I use it for a den.

Q. As far as the gas meter, you have talked about one gas meter being cut off, and you told Mr. Bartusch that the men that sold you the house told you it was cut off? A. Yes, sir.

[52] Q. Did anybody else ever tell you it was cut off? A. I had several, well, I called, well, catched them, one time, a meter man out there, reading the meter. I asked him about it, and he said: "Yes, it is locked up."

And the man that looked at it then, he tell me it is, when he takes, taken it off, I went out and asked:

"Is that meter really locked?"

And he said:

"Yes, it is locked."

And I said:

"Well, I'm paying on it."

Q. You were talking about talking with a lot of people from Light, Gas & Water. Did you ask them their names? A. No, I did not ask them their names.

Q. Some of them? A. I just talked with them. I asked one man I talked with, a man, a woman, one time One time I went down there and asked this man, said to the woman, he said to the woman, when there are two meters at the house, they are s'posed to pay for both of them anyhow, don't they? And I told him, I said:

"Well, one of them is s'posed to be **[53]** locked off. I don't s'pose to pay for it, if it was locked off, if I was paying for both of them."

I merely, just wanted to know was I paying for both. They never would tell me nothing. I didn't mind paying for what I used, that is what I work for, but if they just had explained it and told me what I was paying for, what was they charging me so much for.

Q. We had a note here, we had a note here a few minutes ago that you identified was one the lady had given down at the Light, Gas & Water. A. Uh-huh.

Q. When was that? A. I don't know, but that was the last time I went down, the time I came up there after they cut my gas off that morning, see, that is the last time I went up there.

Q. Was this after the last time? A. After she did that, she got up and got out of there, and I hadn't seen her no more since, and I couldn't never get to talk to her any no more.

Q. Now, Mrs. Craft, you said that, that Mr. Bartusch asked you about after the meters were taken down——(interrupted) A. Uh-huh.

[54] Q. He asked you if you ever got, if that straightened out the problem. Did you ever get two bills after that? A. I got two bills after that, about three times.

Q. After the meters were taken down? A. Uh-huh. You know, I brought them up there and showed them to you.

Q. All right.

Mr. Arnold: That is all, Your Honor.

The Court: Anything further, Mr. Bartusch?

Mr. Bartusch: Just two questions.

Recross-Examination, by Mr. Bartusch

Q. You say there was evidence of another kitchen in your house besides the one you were utilizing, is that correct? A. Yes, sir, was a place in there like, like somebody had had another kitchen, but I use it for a den.

Mr. Bartusch: All right.
Thank you.

The Court: Mrs. Craft, who is the person that you bought your home from, that gave you this information?

The Witness: Let me think of his name, if I can think of his name. Smith, I believe, Smith **[55]** and McGowan Contracting Company, I believe.

The Court: Smith and McGowan Contracting Company?

The Witness: Uh-huh. I think that is the name of it.

The Court: They gave you a deed to the property?

The Witness: Well, I bought it from, my payment goes through the bank, First National Bank, but that is who I bought the property from, you know.

The Court: Yes.
Any further questions?

The Witness: He was the individual that sold it to me.

Mr. Arnold: No, sir.

The Court: You may step down.

(Witness excused)

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[104] Mr. Daniel: That is the plaintiffs' proof, if the Court please.

The Court: All right.

Mr. Daniel: Except for what we'll extract on cross-examination.

The Court: All right, sir.

The Court notes that back in March, when we had a hearing on the preliminary relief that was sought at this time, at that time, that the Court heard testimony from Annie Sue Funzie, and Annie Clara Green, Patricia Pinchuck, as well as one of the witnesses that has testified in this phase of the hearing.

All right, Mr. Bartusch.

Mr. Bartusch: Mr. Mullen.

[105] **WILLIAM T. MULLEN,**
the said witness, having been first duly sworn, testified as follows:

Direct Examination, by Mr. Bartusch

Q. Would you state your name and occupation, please, sir? A. William T. Mullen, Secretary-Treasurer of Memphis, Light, Gas & Water Division.

Q. And how long have you been with the division, Mr. Mullen? A. Approximately twenty-two years.

Q. Have you always been Secretary-Treasurer? A. No. I have been Secretary-Treasurer since July 16th, 1969.

Q. What did you do before you were Secretary-Treasurer? A. I was superintendent of Cash Managements, supervisor, prior to that, Financial Analysts.

Q. And before that? A. Before Financial Analysts, before that, a lineman; before that, lineman helper, before that.

Q. All right, sir.

What are the functions, generally, in the Secretary-Treasurer, Mr. Mullen? A. Well, as the Secretary to the Board of **[106]** Commissioners, I'm responsible for the recording of the minutes of the meetings, attending our meetings, maintaining all of the contracts, and documents related to Board actions.

Under the Treasurer functions, responsible for collection of revenues and disbursement of funds.

Q. And you were the official designator, keeper of the records for the division, is that correct? A. By Chapter 381, yes, sir.

Q. And, Mr. Mullen, all of this work that has been prepared for this case has been done under your direction and control, is that right? A. That is correct, uh-huh.

Q. Now, Mr. Mullen, you have prepared, I believe, a, some charts which indicate the billing procedure of the Memphis

Light, Gas & Water Division, is that correct? A. Yes, sir, uh-huh.

Q. And do you have those charts on that board up there? A. That is correct.

Q. I will ask you, Mr. Mullen, if you would, to step down and take the blank sheet off of that there and explain these charts to the Court, and the other parties, if you will, please, sir.

[107] The Court: All right, sir, if you will, if you will turn that chart so that counsel may be able to see it at the same time the Court can.

That is fine, I can see. Can you gentlemen see that?

Mr. Daniel: I can see.

The Court: All right, sir.

A. Okay. Well, basically, I will try to describe our billing procedure here that provides a service to the customers, as well as terminating the services normally for non-payment or in some cases when the customer is moving, as we have already had indicated, this morning, we can normally, we don't have this distinctive breakdown, but we can normally classify our customers as good, good-pay customers, those that pay their bills on time, without us receiving bad checks or having to terminate service for non-payment of the service.

The second classification, if you would, would be a slow-pay customer, one that does create some problem for us, and then thirdly, we would have a new customer.

Let's say, under the good-pay customer here, real fast, to see how long it would take us normally and the procedure we go through to terminate his service.

[108] He, let's assume, he has been on the line back here for five or six years. He gets a meter. His meters are read on

J nuary the 2nd. He receives a bill sometime approximately in the neighborhood of five days later.

Let's assume that bill is paid, but from that point, we will receive no other payment from this customer.

The start of the consumption is January the 2nd, on January the 8th, as I say, there would be the bill. He would—billing date—he would get a second reading on January the 31st, the meter reader, will receive a bill, the blue bill, that is not sent in an envelope. I have an example of the bills, and it will be sent to his service address or any other designated address that he may so desire, but if he does not pay this bill by the 20th of February, he will have a five per cent assessment. This is the difference between net and gross. We still have not sent, sent any special notices to him, but he has received a bill at this point, and the meters are read again on March the 1st, and he receives his second bill on March the 7th, and he has approximately six, seven days consumption. At this time point, no action has been taken. Again, he has eight, these **[109]** days to pay this, and still no action is taken until the 26th of March, at which point he has some eighty-five days of consumption. He will get what is considered a final notice, a red bill, enclosed in an envelope, to insure the privacy of this individual, but on this final bill, the red bill, it says a specific date that his service will be terminated, terminated.

Okay. If we have not had a response from this customer in the next five days, when the meters are read, when the meter readers are going around for the third time, the electric service will be cut off. I must point out, though, on the cutoff of the electricity, this meter reader is instructed, and it is in the meter reader manual, that he is to knock on this door and to make every attempt to get someone to the door. If there is hardship of any nature or illness in the house, or some, some other, well, if a payment, if they state that payment is in the mail, then this termination of one service will be by-passed.

And, just point out, all of them that went out in 1973, only forty-seven per cent of those cutoffs issued were actually executed.

Okay. Also, at the same time the meter reader will leave what is considered a green door knocker on **[110]** this customer's door, stating that he can take his final bill, go down to the, one of the one hundred paying stations that we have throughout the city to make it as easy as possible for the customer to pay his bill, and pay the amount on this bill, bring it back and call the Memphis Light, Gas & Water and his service will be turned back on the same day, if he calls in before four o'clock. If it is after four o'clock, it would normally have to be an emergency situation for us to, to send someone out to restore his service.

Now, five days later, if we still have not had a response from this customer, we will issue what is considered a delinquent cutoff for the other two services.

This will be a customer serviceman that will go out and terminate those services. Again, he will try to contact the customer. If there is no response, he will terminate the service and leave another door knocker.

So, we feel like that we are providing sufficient notice to this customer. We have gone through three billing periods. We have sent him a final bill. We have attempted, through the meter reader, and also the customer serviceman, to contact this individual, and at **[111]** the point that we terminate the service, he has approximately ninety-five days consumption.

By Mr. Bartusch:

Q. That is ninety-five days that he hasn't paid for, is that right? A. Ninety-five days that he has not paid anything.

Q. All right, sir. A. Now, on a new customer, or one that has created some credit activity, this ninety-five day period is cut back to sixty-five days, but still we are going through what we consider sufficient notice, and we have reevaluated this

policy many times during the last five years that I have been in this capacity, and we have made several changes in it.

Again, let's assume that this customer just came on line, on January the 2nd, or let's say that he came on line even four days before that. He would not get a bill for this period. It must be six days or more in order for him to get a bill after this first meter reading.

We go to January the 31st, and we have the meters read for the, let's consider, the second time. If he comes on four days before this, the bills will be mailed five or six days later. The last day to pay net is twenty, is the twentieth of February, approximately **[112]** twenty days after meter reading, and it is spelled out on the bill, the last date of pay net, very plainly. On March the 25th, if we have not heard from this customer, then he will get this reading notice again, in the envelope.

And on March the 1st, when the meter reader is coming around, we utilize the meter reader to make this first cutoff of one service.

At one time we had a group of about ten men that were making the one service, but in order to effect some economy in our operation, we began to use the meter reader for this one service cutoff.

Again, he is knocking on the door and trying to get someone to explain why the bill is not paid.

On March the 7th, if we still have not heard from the customer, then the customer serviceman has, is dispatched to cut off the gas and the water services on March the 14th.

And this comes into play with one of our accounts—I don't —in p rticular here, we go back for verification that these services are still cut off and many times we will find that service has been turned on by the customer, the meters are read again.

Q. Excuse me just a moment.

I know we are getting into this later, but which **[113]** person do you have reference to in regard to terminating the services again? A. Mrs. Funzie, I believe, for one, of, was turned back on twice.

Q. Not by the Light, Gas & Water? A. Not by the Light, Gas & Water.

Q. All right. Go ahead. A. On April the 1st, the meters were read again, and then we go through the same procedure of cutting off the one service, because normally we find them back on. If we find it back on ten days later, we'll find it back on twenty days later.

We send out an occupant wanted letter and this, again, is what has happened in one of these cases here. I'm positive that a customer living in a house for four or five months, saying she did not receive any correspondence, we resend an occupant letter and that requests this person to call in and have the service put in their name. We find it on, we know it is consumption there from the pre-meter reading to the current date. Again, we go through the service to cut off. We are, many times, up to four or five and six months getting this service off, to keep it off, many times involving putting on a special steel band with steel plate, even going so far sometimes as to **[114]** remove this steel band and this is a tremendous expense to have to send a crew out and take the service.

This pretty well takes us through our procedure.

Q. Excuse me, Mr. Mullen.

How long does the customer have, new customer have? A. I think they will have, without paying, sixty-five days.

Q. Sixty-five days without paying? A. Or slow paying.

As opposed to the ninety-five days of the customer that has been paying his bills on time, not creating any problem, and, for years, for a year, one year.

The Court: Gentlemen, you may proceed.

Mr. Bartusch: If Your Honor please, I'm going to ask that these charts be marked exhibits to this testimony, to Mr. Mullen's testimony, and they were not marked previously.

The Court: All right, let them be identified and with plaintiffs' counsel having the opportunity to examine, to cross-examine pertaining to them, they'll be considered as having been tendered.

The Clerk: Twenty-four, collective exhibit **[115]** twenty-four (a), (b) and (c).

The Court: All right, let's make the first sheet that is used as twenty-four, and the second sheet as twenty-five for identification at this time.

(Whereupon, the said instruments were accordingly marked Exhibit Numbers 24 and 25 for identification.)

EXHIBIT 25

Cha. #2

STEPS FOLLOWED IN TERMINATING SERVICES

NEW OR SLOW PAYING CUSTOMER

Jan. 2	Jan. 31	Feb. 6	Feb. 20	Feb. 25	Mar. 1	Mar. 7	Mar. 14.	April 1	April 8	April 11
Request for Service 1	Meters Read 2	Bills Mailed 3	Last Day to Pay Net 4	Final Notice Mailed 5	Meters Read & 1 Serv. Cut-Off 6	All Serv. Cut-Off 7	Verified 8	Meters Read 9	Occupant Letter 10	All Serv. Cut-Off 11

May 1	May 8	May 31	June 10
Meters Read 12	Second Occupant Cut-Off 13	Meters Read 14	Meters Removed 15

3. BILLED FOR CONSUMPTION AND $25.00 DEPOSIT.

6. ELECTRIC SERVICE (ONLY) CUT-OFF BY METER READER AFTER EFFORT TO CONTACT CUSTOMER.

7. BALANCE FROM BILL MAILED FEBRUARY 6, BROUGHT FORWARD.

8. IF NO CONTACT WITH FLOW BY CUSTOMER.

9. IF CONSUMPTION FOUND, PROCEED TO NO. 10.

By Mr. Bartusch:

Q. That briefly describes our billing procedure. We would like to talk just a little bit, at this point, about the extended payment plan that was implemented in March, on March the 1st, 1973. A. This was the action of our Board of Commissioners, and it has received good publicity throughout the country, throughout the industry, as one of the most liberal aggressive plans anywhere in this country.

We have had papers presented at American Public Power Association, American Gas Association, on this plan, and basically, the purpose of the plan is to help one in financial difficulty by permitting him to pay a portion of his bill and extending the remaining portion over the next, well, following months, whether it be two or three or, some cases up to twelve, and we know three of the four plaintiffs here, in this case, **[116]** took advantage of this plan.

First, we have to identify the hardship cases, and at this point, we have some thirteen credit counselors at the division. All of them have long years of service. Many of them are over twenty years of service, and they have been dealing in customer accounting information center or interview department. This is where the training is obtained before they move into the credit collection department, and they are exceptionally good, we feel like, at identifying the hardship cases.

The guidelines were extremely flexible, realizing that every individual case seems to vary. There is just no set pattern for any two particular cases. But the guidelines were standard, that the payment must be one-half of the outstanding balance with the remaining portion to be deferred over the next three months. Again, this is geared, the flexibility is geared to the level of income. We have had one customer with approximately Nine hundred dollars a month income, because of severe illness in his family, he has had to come and see the credit department about this plan, and in some cases, we have extended,

as I said before, I believe, this plan over twelve months, when the bill was extremely high.

[117] Mr. Bartusch: May that chart be marked?

The Court: Let it be identified as exhibit number——

The Clerk: Twenty-six.

The Court: Twenty-six.

(Whereupon, the said instrument was accordingly marked Exhibit number twenty-six for identification only.)

A. (continuing) ——When this plan went into effect, we did broadcast, advertise or what-have-you in every means, every way that we felt was appropriate. We had Commercial Appeal, for approximately six days, right after the plan went into effect, the Tri-State Defender, the Whitehaven Press, East Memphis Shopper, Consumer Times, we had some three hundred spot announcements on radio about this plan, telling people if they are having difficulties to come and talk to us, because a customer must initiate the action. We cannot go out and try to identify a hardship case in the field.

Also, we have had talk shows with our C.R. department going on the air for thirty minutes, taking phone calls, and I believe we have had people out of the credit department, have gone out to church groups and talked to them. They have worked with different **[118]** organizations like the Black Knights, the Millsaps, the Welfare, Mapsouth, Welfare Department, and also, we have gotten real good cover from our collection mail, enclosing publication that is put out, put out to all of our people in Memphis, but in addition to that, it goes to many businesses around the country, town, to many pastors, so we feel like that plan was communicated.

Q. Mr. Mullen, while you are talking about publicizing the plan, I believe you have a schedule with you, do you not, reflecting the dates that the articles were in the paper and the

number of radio commercials? A. (Witness is producing schedule.)

Q. Is that correct, do you have? A. Yes, sir, I do have it. I was reading from that.

Q. Would you tell the Court, I'm going to ask in a moment that it be marked for identification, would you tell the Court the number of commercials, radio commercials, that were communicated? A. Yes, sir. I mentioned over three hundred, but they are listed specifically, and we do have examples of these ads, in addition to that, we have posters, I failed to mention this.

Q. Well, excuse me just a minute.

[119] Mr. Bartusch: While we are on this particular aspect of the advertising of this, I'd like to, for purposes of identification, to mark that, mark that, that that he has there, Your Honor, and, and, as an exhibit for identification only, which includes the list of dates of radio broadcasts, with a copy of the article appearing in the newspaper.

The Court: All right.

Let them be identified as the next collective exhibit number.

The Clerk: Twenty-seven.

(Whereupon, the said instrument was accordingly marked Exhibit number twenty-seven for identification.)

Mr. Bartusch: I believe he is going to, Your Honor, going to use this.

I am going to introduce them as a folder; is that okay?

The Witness: I don't have it as a packet.

Mr. Bartusch: I believe you can just give it to him as a folder. Shall we introduce it this way? It is the same thing.

The Witness: Yes, sir, except we do have a collection of articles that go in here with this **[120]** articles.

Mr. Bartusch: All right, sir.

All right, here. Let Mr. Arnold see that, if you will. He may—Do you want to see the collective package again?

Mr. Arnold: Yes, sir.

The Court: All right. Let the folder and documents included there be identified with the next identification number, Mr. Clerk.

By Mr. Bartusch:

Q. All right, sir.

Now, Mr. Mullen, you indicated that you had some charts there too with regard to the extended payment plan and advertising, I believe. A. Yes, sir, I do have it. This is shown on here. I was perhaps getting a little ahead of that. I have a couple of more points I would like to make on this phase which we are talking about.

Q. All right, sir. Go right ahead. A. Contact, contact may be made at the main office or can possibly be made by telephone. We'd rather the person would come in and sit down and work out the extended payment plan in the office, because, at the present time, we are requiring signatures. I believe in one of these cases, we did not obtain the **[121]** signature, but I believe this brought it to light, we did need signatures on this, but also we have established two community credit stations, one at Greater Temple Square, the Chelsea and Dunlap, and one in the Sanders' Drug Store in South Parkway, in Memphis, in South Memphis, these are the most difficult areas as far as what we have been told, is most critical areas. These two locations will serve forty per cent of our customers.

I mentioned earlier that we have ninety to one hundred paying stations around town to make payments easier for customers to go by their favorite drug store or grocery store or bank and pay his bill.

Mr. Bartusch: May we have that chart marked as the next exhibit number for identification, please, Your Honor?

The Court: All right, let it be identified, Mr. Clerk, as Exhibit twenty-eight.

The Clerk: Twenty-eight.

(Whereupon, the said instrument was accordingly marked Exhibit number twenty-eight for identification.)

By Mr. Bartusch:

Q. And what is that, what is the chart number up in the corner, please? **[122]** A. Chart, chart three contained.

Q. All right.

Will you continue, please, Mr. Mullen? A. This is about what I have, I have used, gone through, as far as extending information about the extended payment plan, I would just be repeating myself if I read this.

Q. All right, sir.

Mr. Bartusch: May we have that chart marked Exhibit twenty-nine for identification?

The Court: All right. Let it be identified.

The Clerk: Number twenty-nine.

(Whereupon, the said instrument was accordingly marked Exhibit number twenty-nine for identification.)

A. (Continuing) Again, the next chart is also spelling out the groups that we have worked with and when I say "worked with", Frank Harty, who is president of Credit Collection Department, has had groups of these people to come in and sit down for a half day at a time and come back at a later date if they need to be brought up-to-date on new policies or changes in the present policies, and he discusses and explains our billing procedure to those, these groups.

[123] We also have information handbooks that are passed out by customer servicemen, when a new customer comes on line, he will give them this little information book, handbook, explaining our billing procedure, how a person should pay his bills within a limted amount of time to avoid cutoff, and Welcome Wagon also puts out a little pamphlet book, information book, about utility services.

Mr. Bartusch: All right, sir.

I would like that chart marked, please, number thirty.

The Court: Let it be marked with the next exhibit number.

The Clerk: Thirty.

(Whereupon, the said instrument was accordingly marked Exhibit number thirty for identification.)

A. (continuing) The next chart will just graphically illustrate that, how the extended utility plan works. This is an example.

In February the bill gets to sixty dollars. It is in the dead of winter. We have gas bill of forty-one dollars here. He is able to pay only thirty dollars. This is accepted with no work being done as far as terminating his services. This is **[124]** accepted at this point, because he perhaps says that he'll pay the balance. Next month the gas bill is still pretty high. With the thirty dollar balance brought forward here (indicating), he now has an eighty-two dollar bill. His financial situation is no better, or perhaps even worse, he comes in and works out the extended payment plan. He'll pay thirty-one dollars and ask that the fifty-one dollars be deferred over the next three months in seventeen dollars per month payment.

Okay. This will go forward to his April bill, and it will show you up as an EPP, extended payment plan, of seventeen dollars. The remaining amount will show up on this bill, unless he violates his agreement, again, as we have had in a couple of cases here, violation even of these agreements. Then that payment will be accelerated as it fulfills the agreement we

have with the customer and bring forward the whole balance ——(interrupted)

Q. Excuse me, Mr. Mullen. Before you leave that, did you send out a notice of termination and tell them to disregard the notice of termination, all at the time, all at the same time? A. Absolutely not. I believe I did read where that was done in the Palmer case; but, no.

[125] Q. All right, sir. A. Once we have this agreement, he'll get no final notice until he, until he fails to pay. He'll get regular bills, just like any other good paying customer.

Mr. Bartusch: Let that be marked.

The Court: Let it be identified.

The Clerk: Number thirty-one.

(Whereupon, the said instrument was accordingly marked Exhibit number thirty-one for identification.)

A. (continuing) ——The next couple of charts will be just relating to some of the facts, as bought, credit activities.

We send out delinquent notices, or we sent out in 1973, two hundred two thousand. Now, compare this to approximately three million one bills that went out during the year, and you are talking about somewhere in the neighborhood of seven per cent of the customers. Now, this still may be, compared to one of your big department stores, or something, while we do enjoy the monopolistic advantage of service in the community, we also have to sign up all of our customers then, and we don't solicit our customers. So, for this reason, we know that we are going to sign up many **[126]** customers that are, we know, are going to create a problem for us, so we are sending out two hundred and two thousand notices for, from the general one-service cutoffs of forty-seven thousand.

Now, from those one-service cutoffs, only twenty-two thousand of them are completed, and this ties into the earlier figure that I was showing of forty-seven per cent of those one-service

cutoffs that are carried out by the meter readers, are actually complete, because he is knocking on the door and finding out, in many cases, that the payment has been mailed in.

There is a hardship case, I believe Mrs. Pinchuck pointed out, that, and said that she come to meet the meter reader and said she had a sick child in her house, that cutoff was bypassed.

Okay. Going beyond the one-service cutoff, there are twenty-eight thousand all-services granted that it would be on that, comes five days after the one-service, because, but if we only complete sixty-two per cent of this, in many cases we went out and found that the one-service had been bypassed and may find the same hardship existing five days later and bypass it again, but they would bypass it, telling that customer to call in to the service **[127]** department and make some kind of arrangement.

We are making every effort to keep these meters going, because we are, we have no, we are making no effort whatsoever, to stop the meters from turning. When this meter **starts** (stops) turning, we stop revenue.

The customer contacts, as far as those coming into the credit office, were approximately sixty-two thousand last year. We had seen a tremendous acceleration in this action March the 1st, when the new extended payment plan went into effect. In fact, we are having, on certain days of the month, usually the first Monday in the month, excess of seven hundred people coming into the credit and collection department, so, again, I might make a comment to the fact that someone might have gotten what they thought was a rude response, but it was these, this group of thirteen credit counselors that we are talking about, trying to satisfy seven hundred customers in a period of eight hours. It is rather difficult to do, and sometimes they are not taken as, taking as much time as they would, and the customer would interpret that as him being rude, and

many, in just about all of the cases, I would have to deny, because these people are well-chosen for this job. They are picked from, **[128]** if we may use the term, the "cream of the crop" of our employees, as far as dealing with customers.

By Mr. Bartusch:

Q. Okay. A. The neighborhood counseling locations got good response in 1973 and, again, we go, we are seeing this go up rather swiftly, and we had three thousand five hundred in '73, and we'll probably have in the neighborhood of six or seven thousand in '74. There is no way we can determine the telephone calls, because we have some thirty or forty information center employees that take these calls, and those people will be given extensions up to three days, but they tell the person on the phone that if you cannot make some kind of arrangement after three days, through the credit department, then your service will be terminated as indicated.

Out of the extensions that were requested, forty-two thousand, ninety-one per cent of them were given, so again, this demonstrates our liberal policy in working with its customers.

Well, there may be one day extensions, there may be one week extensions, many people don't ask for the extended payment plan, they'll ask for just perhaps a week until they get their check in or something. We **[129]** have offered a budget, budget billing, that will allow persons who pay a little bit extra in the summer months, when the utility bill is down, and allow that to be applied on, over the months when the cold season is here, on the utility bill.

EXHIBIT 31

CHART "A"

ADDITIONAL INFORMATION AND METHODS USED IN DEALING WITH HARDSHIP CUSTOMERS

1. DELINQUENT (FINAL) NOTICES MAILED IN 1973	202,000
2. ONE SERVICE CUT-OFFS ISSUED	47,000
3. ONE SERVICE CUT-OFFS COMPLETED	22,000
4. ALL SERVICE CUT-OFFS (DCO) ISSUED	26,000
5. ALL SERVICE CUT-OFFS COMPLETED (EST) (62%)	16,000
6. CUSTOMER CONTACTS BY CREDIT DEPARTMENT	
(A) MAIN OFFICE	62,000
(B) NEIGHBORHOOD COUNSELLING LOCATIONS	3,500
(C) TELEPHONE	Amount Undetermined
7. EXTENSIONS GRANTED (91%)	43,000
8. BUDGET BILLING OFFERED.	
9. METER READERS' ATTEMPT TO CONTACT CUSTOMER ON HIGH READING.	

CHART #1 (CONT'D)

10. GROSS PAYMENT REDUCED FROM 10% to 5% IN 1973.
11. TWO DISCOUNTS ALLOWED PER YEAR IN 1973.
12. EXTENSIONS OF NEW PAY DATE FROM 15 TO 20 DAYS IN 1973.
13. INVESTIGATION OF HIGH BILL COMPLAINTS (CUT-OFF PROCEDURES DELAYED)---------- 33,000
14. ECONOMIC IMPACT OF INCREASED BAD DEBT EXPENSE IS GREATEST ON LOW OR FIXED INCOME CUSTOMERS.

Mr. Bartusch: Just a minute, Mr. Mullen. We request that be marked.

The Court: Let it be so identified.

The Clerk: Number thirty-two.

(Whereupon, the said instrument is accordingly marked Exhibit number thirty-two for identification only.)

A. (continuing) ——Other than that, what we have done in the past two or three years, we have reduced the gross payment, the difference between net and gross on the bill, prior to 1973, was ten per cent and we took the initiative on this; in fact, we did get some criticism from our suppliers here of electricity and many of the other corporates that were following ten per cent, and then down to five per cent, apparently from this. We took the lead, then Dresden, Lexington and, well, places like this followed, but we took the lead, we had to take the lead. We feel like we can be the one to take the credit in that regard.

[130] We also have the two thousand, a low two thousand allowance, allowed per year. In 1973, a customer that is, he is not able to meet that, meet that, he can call in and say he would like to take care of the net average, so he may do that twice a year, where he will still be given a gross allowance, even though it extends beyond. We also extend the net payment date from fifteen to twenty days, again, we could go no farther on that because of our billing procedure, where the situation is divided into twenty-one cycles, assuming twenty-one workdays in the month, each day some process is going on on this bill, of course, one day it is read and in, let's say cycles, one, the next day the meter reader will be reading in cycles, they, but after it has been read on the first day, then there is a process going on as far as getting it into the computer that is located and, in our city as opposed to the one that was mentioned in the Palmer case. All information is fed in right in our administrative building, all of the processing is done in that building.

Anytime anyone complains of a high bill, we dispatch what is considered a meter investigator.

In 1973, there were approximately thirty-three thousand of these, and I might add that very few of them **[131]** found that the meters were registering incorrectly, because the meters are pretty well constructed and very seldom do we find a meter that is registering improperly.

Talking about the economic part of the roles of this bad debt, or this slow-paying customer, are those people that get in trouble in paying the bill. It is certainly an added expense to the division, can demonstrate the totaling; a bad debt expense in 1970 was two hundred and sixty. As you can see, it worked along pretty even there for about three years, but in 1973, it went up approximately sixty per cent, is headed up at the pace, at the same pace, again in this year, approximately fifty to sixty per cent this year.

Now, one of the major factors involved here is the fact that we have liberalized our plan. We know that the impact of this increased expense right here is going to be more than many of our low income or fixed income people that pay their, our bills on time. These people, we know, are perhaps our best paying customers. They budget their income out and they pay us on time; wherein your middle income and upper income people might neglect their bill on occasions, but I hazard to guess a larger percentage of our **[132]** low incomes and fixed incomes pay their bills on time. So, we feel like there is no need to burden them with additional costs created by people that will not pay, do not pay their bills when they come on the line, because we see people living in the same house that will rotate the services in maybe four or five different names. As a bill is terminated in one name, they'll just change it over to another name. They come on the line with no intention whatsoever in paying for the bill.

Mr. Bartusch: All right, sir. May I ask that be marked Exhibit, I believe, it is thirty-three, for identification.

The Witness: This is the last chart I do have.

The Court: Let it be so identified.

The Clerk: Thirty-three.

(Whereupon, the said instrument was accordingly marked Exhibit number thirty-three for identification only.)

By Mr. Bartusch:

Q. Now, Mr. Mullen, back when you were talking from the chart about the, the extended payment plan, that was the plan, I believe, that has been attached to the interrogatories. It is marked as Number fifteen **[133]** for identification, called "Procedure of New Credit Policy Extended Payment Plan," is that correct? A. Yes, sir, uh-huh.

Mr. Bartusch: And, Your Honor, that has, as I say, that has been previously marked for identification as number fifteen.

I would like to introduce that as——(interrupted)

The Court: Let it be introduced, without objection.

(Whereupon, the said exhibit previously marked number fifteen for identification was received in evidence.)

By Mr. Bartusch:

Q. Now, there is one other thing that I want to ask you about, Mr. Mullen, that you touched on briefly, and I believe I might have cut you off on it, with regard to the publications, general notice to the public, of the availability of the extended payment plan, and you indicated as newspaper articles and radio and you had some, couple of pictures or something up there. A. Yes, sir, I realize I couldn't get back in without moving——(indicating)

——These are charts that were installed in **[134]** businesses throughout the city, as well as on the Memphis Transit Buses, telling you people to come in and contact and let's talk about the credit problem. All we want to do is stay in contact with

that person, keep that person buying it, paying the bill, and again, we don't want to terminate the service. This would be a part of the ways and means, telling about the plan. This is still being used, by the way, these means of communication has not stopped just because the plan went into effect in March, we had a lot of newspaper and radio attention given to it at that time.

Q. Is there any estimate of how many of those you put around, Mr. Mullen? A. There are in excess of twenty-five thousand, these two posters.

Q. All right, sir.

Mr. Bartusch: I would like to ask that it be marked also, the next exhibit.

The Clerk: Thirty-four and thirty-five.

The Court: All right, let them be marked for identification.

(Whereupon, the said instruments were accordingly marked Exhibit numbers thirty-four and thirty-five for identification only.)

[135] By Mr. Bartusch:

Q. Now, Mr. Mullen, if I may, could you tell us just briefly, what is the legislative authority for the, that setup, the light, gas and water? A. Yes, sir, I believe I referred to Chapter 381 earlier, but I did not say, that is, Chapter 381 of the City Charter.

Q. It authorizes—Excuse me, Chapter 381, Public Act of 1939, right, which is part of the City Charter? A. Uh-huh.

Mr. Bartusch: I believe that has previously been marked for identification under Number twelve, and I would like to have that introduced as an exhibit, if I may.

The Court: Without objection, then let it be introduced.

(Whereupon, the said exhibit previously marked number twelve for identification was received in evidence.)

By Mr. Bartusch:

Q. Now, Mr. Mullen, with regard to Chapter 381, I would like to call your attention then, I believe it is, to Section 8. A. Yes, sir.

Q. And before we get into that, I'll ask you, does **[136]** Chapter 381 generally, and with some degree, perhaps, specificity, outline the functions of the Light, Gas & Water Division? A. Yes, sir, that is correct.

Q. And I would like to call your attention particularly to Section 8 and ask you if you would read that to His Honor and to the gentlemen here at the table. A. (reading) "Section 8. Be it further enacted, that said Board of Light, Gas and Water Commissioners shall have the power and authority to promulgate and enforce such rules and regulations governing the distribution of light, power, gas and water, as they may deem proper in the operation of said Light, Gas and Water Division."

Q. Excuse me. Now, Mr. Mullen, pursuant to that provision, has the Board of Commissioners made certain rules and regulations? A. Yes, sir, they do have a Rules and Regulation policy manual for each one of the divisions that is continuously updated and needed.

Q. All right, sir.

Now, Mr. Mullen, out of that, each of those policy manuals, I believe we excerpted, Xeroxed certain sections relative to termination of services, **[137]** and I believe they are number eighteen on the list of exhibits for identification, and I'll ask you, if I may, what those, just briefly, what each of those sections out of the manuals state and what they relate to. A. One relates to gas, one relates to water and one relates to the electricity. It gives the authority for termination or disconinuance of services, under normal conditions, or under non-payment conditions or what-have-you.

Mr. Bartusch: All right, sir.

And I would like, rather than to introduce the entire manual, Your Honor, we can, but we have that as number eighteen, Xeroxed portions, would like to introduce that as **testimony** (exhibit) to part of Mr. Mullen's testimony.

Mr. Arnold: No objection, Your Honor.

The Court: All right. Let it be introduced.

(Whereupon, the said exhibit previously marked number eighteen for identification, was received in evidence.)

By Mr. Bartusch:

Q. And, of course, your termination procedures are pursuant to those rules and regulations; is that correct? **[138]** A. Yes, sir, uh-huh.

Q. All right, sir.

Mr. Mullen, now, you mentioned previously, and I believe you have in your hand, a light, gas and water bill, that is the blue item, is that correct? A. Yes, sir, uh-hum.

Q. You might have touched on this briefly, Mr. Mullen, but just tell us what is that item, what is, what does it say on it, and how is it used with regard to light, gas and water? A. I'm sorry. You want to——(interrupted)

Q. I just want you to tell me what the blue bill says, what is it for, and what you do, you do with it. A. This bill is sent on monthly basis, from actual meter readings, or in some cases, where there is absolute necessity, it may be from an estimated billing. This estimated billing is done on only one a quarter, if at all possible. For instance, if it is raining today, and the meter reader cannot go out and read cycle one, it is raining the same date next month, that cycle one should be read, then they'll skip cycle two next month and read cycle one on cycle two's day, but all attempts are made to estimate no more than, no oftener than once a quarter, but anyway, the items are listed on here as gas, electricity, **[139]** and water, and by city or district. We

do include the sewage charge and city service fee. We have any balances brought from, forward from the previous month, we have any agreed to maybe extended payment plan that may be incorporated on here under the initials "EPP". It gives the gross amount that should be paid. It gives the net amount that should be paid, and tells the last day that that amount can be paid.

Q. All right, sir.

And on the reverse side, just briefly, what information is contained? A. It gives a code to the initials used on the front side.

Q. All right, sir.

Mr. Bartusch: I'll ask, let me see, I believe that is number six under identification, and I would like to introduce that at this time, if Your Honor please.

Mr. Arnold: All right with us.

The Court: Without objection, let it be introduced.

(Whereupon, the said exhibit previously marked number six for identification was received in evidence.)

[140] By Mr. Bartusch:

Q. All right.

Is that the bill that is utilized, utilized with regard to all customers of Light, Gas & Water? A. That is correct, uh-huh.

Q. And is that the bill that was utilized in the case of these individuals, individual plaintiffs, Mr. Mullen? A. After they signed up for the service, that is the bill that was used, yes, sir.

Q. All right. A. We had one that had not signed up for service to, they were getting an occupant wanted letter, not a card.

Q. What is the occupant wanted letter? A. I mean asking, one first of all, stating that consumption had been found on the meter and asked one to come in and sign up.

Q. All right, sir.

Now, in your previous testimony, you made reference to the final notice and I believe you've got a copy of that up there? A. Yes, sir.

Q. Don't we have several here? A. Yes, sir.

[141] Q. Would you tell the Court, first of all, what color is the "final notice"? A. It's red, as opposed to the blue regular bill.

Q. All right, sir.

What does the final notice have on it, Mr. Mullen? A. It has the amount that is due. It says that the last day to pay, and it says, according to our record, your service is overdue for payment, if unpaid by date indicated, it will be necessary to terminate your service and the charge of three dollars will be made for this termination.

Q. And in addition to the final bill, we do have a flyer, I believe you referred to earlier as a stuffer? A. Yes, sir.

Q. Just a minute.

Mr. Bartusch: Let me ask that the final bill be introduced. It is number seven for purposes of identification only.

Mr. Arnold: No objection.

The Court: Let it be introduced.

(Whereupon, the said instrument, previously marked number seven for identification, was received in evidence.)

[142] By Mr. Bartusch:

Q. All right, sir.

Now, go ahead, stuffer is my term. I don't know what your term is, Mr. Mullen, on that. A. Yes, sir.

Q. Would you tell us what that is, what we're talking about there? A. Okay.

Included in the envelope with the red final notice is what we consider a flyer. This flyer says:

> "If you are having difficulty paying your utility bill and would like to discuss a utility payment plan, or if there is any dispute concerning the amount due, bring your bill to the office at 220 South Main, Monday through Friday, or phone 527-0311."

This is trying to give the customer an opportunity to have his dispute heard.

Now, in addition to these flyers that I mentioned, that goes in all bills, all final notices, except those going to those specific areas that are accommodated by the community, credit counseling stations. We have approximately, we have, we have seven cycles that includes the same wording except it specifies Sanders Drug Store, South Parkway and Lauderdale at **[143]** the time that those stations are, three to six, allows a person to come back by after one and tells the specific days that he will be there, and then the ones going to the northern part of town, it says:

> "Greater Temple Church, Chelsea and Dunlap."

Again, identifying the hour that the credit counselor will be there.

These credit counselors have the very same authority to grant credit, to work with the companies' customers, on the extended payment plan as those credit counselors in the office. In fact, they are alternates and work in the office part of the time, or go out to the community center the rest of the time.

Q. All right, sir.

Mr. Bartusch: Now, I would like to introduce those and they are identified as nine (a) and (b).

The Court: Without objection, then let Exhibit nine (a) and (b), be introduced.

(Whereupon, the said instruments, previously marked Exhibit number nine (a) and (b) for identification, were received in evidence.

[144] By Mr. Bartusch:

Q. Now, you mentioned previously, I believe, that, that the final notice goes out in an envelope, is that correct? A. Yes, uh-huh.

Q. And this flyer, or stuffer, as I call it, also goes out? A. (Nods head in the affirmative.)

Q. So you get your final notice together with that stuffer, is that standard procedure for all customers of Light, Gas & Water Division that requires this final notice? A. Yes, sir.

Q. Was it aptly available to the plaintiffs in this case? A. It was.

Q. Same procedure applied to them as to everybody else? A. That is correct.

Q. Uh huh. All right, sir.

You mentioned something previously, and it is, I believe you were waiving it to some degree, it is a green item that you call a door knocker, and you commented previously on that, previously, briefly, Mr. Mullen, and I would appreciate your giving us a little **[145]** bit more information about what a door knocker is. A. Okay. This is a green door, door knocker that is placed on the door handle, should the meter reader that is cutting off the one service, on the door, if they find no one home.

Q. Yes, sir.

What—— (interrupted) A. It states the date, the amount that is shown, the address, if there is any dispute on it of the address, and gives the customer's account number. It is a courtesy of the Memphis Light, Gas & Water Division. It says:

> "The Memphis Gas, Light & Water Division will be pleased to reconnect your service later today. First, take this card and your red and white final notice to the nearest store accepting utility bill payments or come to our administration building at 220 South Main to pay your bill. Then call customer service at 523-0711 before 4:00 P.M. to notify us that your bill has been paid. When a serviceman arrives, show him your receipt for payment and he will reconnect service. If you call after 4:00 P.M., our serviceman may not get **[146]** to your home to reconnect service until the next day."

And again, this is saying in most likelihood, he will not, but if there is an emergency, a critical situation, we will connect the service anytime.

Q. And that is utilized on one service customers? A. That is correct.

Q. All right.

Mr. Bartusch: I would like to introduce that, if Your Honor please. That is number eight on the Clerk's list for identification.

The Court: All right, sir. Without objection, let Exhibit eight be introduced.

(Whereupon, the said exhibit previously marked number eight for identification was received in evidence.)

By Mr. Bartusch:

Q. Now,—— (interrupted)

The Court: Before you go further into the testimony of this witness, we'll take a brief recess.

(Whereupon, at 2:55 P.M., the Court was in the afternoon recess and pursuant to the recess, Court reconvened at 3:00 P.M. and the following proceedings were had.)

[147] (Whereupon, Witness Mullen returns to the witness stand and resumes his testimony as follows.)

The Court: All right, Mr. Bartusch.

By Mr. Bartusch:

Q. Mr. Mullen, is there any division policy relative to termination of services in a period of serious weather or otherwise? A. Yes, sir.

Again, I think it was demonstrated in one of these cases, and I forget which one, without looking at the record, but they were due for a cutoff on the 28th of December, and I recall, and the service was not terminated until January the 7th. This was because of the holidays and I would say that some five or six days out of the year, when we have the severest weather, as far as temperature, we'll bypass our cutoffs.

Q. All right, sir.

Now, I want to direct your attention a moment to a couple of questions that were posed in the interrogatories by the plaintiff, and I'll ask you if there are training programs that are given to persons that, who do the physical termination of customers' utilities. A. Yes, sir.

[148] Q. Just a question or two. A. Yes, sir. We do have a manual for both the meter readers, a complete manual of their duties and responsibilities, and one section relates to termination of services, one of their duties.

Also, we have a manual for the customer servicemen. That, again, spells out his duty and this is kept in his pickup truck, as many of us, all of us, I'm sure, are aware that the customer serviceman is called in case of any trouble in mine, in your home, with any of the utilities, and it is put, it outlines his duties and how he should treat each situation, as well as termination procedures.

Mr. Bartusch: I believe those are exhibits thirteen (a) and (b) for identification and I would like to introduce those, if I may.

The Court: Without objection, let them be introduced.

(Whereupon, the said exhibits previously marked number thirteen (a) and (b) for identification, were received in evidence.)

By Mr. Bartusch:

Q. Now, Mr. Mullen, without going into details, into those documents, does it indicate that, if possible, there should be personal contact? **[149]** A. Yes, sir.

Q. Made in what regard? A. Emphasis is placed on attempting to contact one at the home before service is terminated.

Q. All right, sir.

Again, Mr. Mullen, I believe we have touched on it briefly, but when a customer has a complaint about his bill, the light, gas and water, with whom does he talk and how is it handled; what is your procedure? A. He is referred to the credit collection department to contact one of the thirteen credit counselors, as I mentioned earlier, if he does not receive satisfaction from this credit counselor, then he is referred to what is considered at this job classification as chief clerk. Again, if he is not satisfied, and he expresses his dissatisfaction——(interrupted)

Q. Excuse me just a moment. Can you name some of the chief clerks? A. Yes, sir, chief clerk is Leonard Beck, Glenn Frost, if he is not satisfied, these two men, of course, have, I believe, both of them, are in the neighborhood of twenty years of service, and most of this twenty years has been spent in the credit collection department, they do understand the people's problem, and we feel that they treat them as fairly **[150]** and as impartially as anyone can be treated.

Now, if they don't receive satisfaction there, they go to the supervisor, who is Joe Eggars, again a man with twenty-five years of service, just recently received his twenty-five year pin, and is noted, again, among the American Gas Association Credit Section as one of the finest credit men in the country, along with the superintendent, Frank Harty, who is also available if

satisfaction is not reached through Joe Eggars. Frank Harty is approaching thirty years of service.

Q. All right, sir.

Now, I believe in response to one of the interrogatories we produced Exhibit Number fourteen for identification, which is the organizational chart, the light, gas and water, and I would like to ask that be made an exhibit to your testimony at this time and——(interrupted)

Mr. Arnold: No objection.

The Court: All right.

Let it be introduced.

(Whereupon, the said instrument previously marked Exhibit number fourteen for identification was received in evidence.)

[151] By Mr. Bartusch:

Q. (continuing) ——And now, Mr. Mullen, I believe you stopped with Frank Harty. Where do you go from Frank Harty, or how did you go? A. Okay. Okay. These are the people that are located on the first floor for the convenience of the customers. If they're not satisfied there, then the next approach, apparent step, would be to come to my office.

Now, the other managers on the same level and organizational structure that I, that will listen to their complaints, and work with the customer and, in the credit department. It would be seldom that we would overrule the credit department, certainly, because they are the people that know the business, that deal with them day in and day out, but in some cases, we do modify the decision made in the credit department.

Now, beyond these people who were there on the full-time basis, they can still go to the Board meeting, open Board meeting, at 2:00 every Thursday afternoon, and we were looking back through the records in the last eighteen months, we have actually had ten people to come in and protest before the Board.

[152] Q. Before the Board? A. Yes, sir, before the Board of Commissioners. In the many cases, the problem was solved, or the complaint was resolved at that level.

Q. All right, sir.

I would like to ask you with regard to the various procedures of billing that you've talked about and the termination notice, and the inclusion in the termination notice of flyers, and the entire procedure for billing and termination; was that followed in the case of plaintiffs, according to the record of the Light, Gas & Water Division? A. In all cases, all cases, all four of these cases, it was followed.

Q. All right, sir.

Mr. Mullen, I'd like to ask you this. There is such procedure as estimating bills or estimating readings, is that correct? A. Yes, sir.

I mentioned earlier that we do estimate occasionally because of inclement weather or perhaps illness, along, among significant number of our meter readers.

Q. All right, sir.

How frequently is that done? A. It will only be done one month out of a quarter, **[153]** and if it can be prevented, or be avoided, we will not estimate anymore than one month a quarter. However, I will say that in most cases, you will not average one estimated bill in any twelve months period.

Q. All right, sir.

We are all familiar with the Palmer case, and it was a proposition raised in that case, Mr. Mullen, that the estimating of the bills was low, but the actual readings were high, is that true in the case of Memphis Light, Gas & Water Division? A. I feel like we do have a good estimating procedure. I don't feel like that you will find our estimating coming under or before more than five per cent of what the actual reading is. Basically, what we are dealing with is, if we are reading cycle one today,

and we have to bypass it because of rain or something, we should be reading cycle one today, we will read cycle two tomorrow—I'm sorry. We'll have to back up. Cycle twenty-one was read the day before, we would use cycle twenty-one the thirtieth day reading at that point, as compared to the previous month, and get the percentage of that month to the previous month, and then apply to those meters that should have been read today, incorporating certain **[154]** other factors, such as, whether there is an extra day in the month or not, bring it into degree days, degrees days. We are multiplying the temperature times the day, days, days that it was at that particular temperature, so we do have what we consider a very effective estimating program, and we have had very few complaints on this.

Q. All right, sir.

Now, would you explain briefly, I believe it was Mrs. Craft, if I'm incorrect, that had the problem with two meters and had to have the single meter installed. What is the responsibility of the Light, Gas & Water Division with regard to the installation of the single meter or whether it is a double meter? A. Okay.

Our responsibility is connecting the service to the house and then connecting it to the wire coming out from the weatherhead, as it is called, which goes down into the meter receiver. We have provided the meter, but that is the only part of the house, connecting with the house, inside or outside that the division is responsible for.

Now, there is no reason that we would contact a customer and ask them to consolidate their meters. That is the customer's responsibility. It is his **[155]** responsibility to call an electrician to make this correction or, in the case of the gas meter, it is his responsibility to call a plumber to consolidate the gas services.

We have no reason to go out and seek out a person that has two meters, because many of our houses, as you indicated, many of them are duplexes and duplexes, they will have dual

meters, but in no way do we have duplicate metering of your service. We'll admit meter of servicing, go into a house on occasions.

Q. All right, sir.

Now, I'll ask you, Mr. Mullen, if you will, we'll talk a few minutes about the individual accounts of each of these people that have testified this morning, and I will, for purposes of keeping it in order, I believe Mrs. Craft testified first.

You have attached, and is to our answer and I believe the interrogatories too, the record of the Light, Gas & Water Division regarding Mrs. Craft's account, and it is identification number two.

Mr. Bartusch: I would like to introduce that, if I may, Your Honor. That is,—I want to introduce Mrs. Craft's account, which is number two.

Do you have any objections (indicating to **[156]** Mr. Arnold)?

Mr. Arnold: No objection.

The Court: Well, the Court understands that you have already attached to the amended answer an exhibit which purports to show the Craft account, or accounts, and the Court will understand that this is marked as Exhibit (a) to the amended answer, the Craft matter, and the Court will treat that as already having been submitted as a part, absent any prior notice of objection on the part of the plaintiffs, so that is introduced as Exhibit (a) to the amended answer, and counsel has already stated in respect to the individual bills, or some of the bills, individuals, individual bills, that were introduced through Mrs. Craft, that they coincide, although not all of the bills were, that were actually received by the customer, were available to be introduced for comparative purposes.

Mr. Bartusch: All right, sir. I would also like to introduce, I guess this would be for identification then, an updated report

on the Craft account, Your Honor, and I would, would pass this to Mr. Arnold.

(Passing instrument to Mr. Arnold.)

[157] The Court: All right. While he is examining that, or his client has the opportunity to look at it, you may proceed.

Mr. Bartusch: All right, sir.

The Court: I'll consider that it is tendered and it will be dealt with after counsel has had an opportunity, and his client, to look at it.

Mr. Bartusch: All right, sir.

Q. Mr. Mullen, you are familiar with the Craft situation, basically. Let me put it this, this first question to you:

What was the problem with the Craft account, if there was one? A. I think certainly we have to consider that a unique situation, fully, we don't run into it everyday, where we run into a person that is not aware of two meters running, and being issued two bills, because certainly the account that Fartheree, Ed Fartheree's name was billed on a monthly basis from October through January. These bills went to this address. Someone, I'm sure, received the bills. They were received. The Crafts were receiving their bills. Certainly, the Fatheree bill should, should have been arriving too. That bill was turned over to a collection company **[158]** after the services were terminated in January, fifty-five dollars was owed on the Ed Fartheree bill and the meter reader was going by each month and he, he was finding consumption on this bill.

Q. There was consumption on the bill? A. There was consumption on the bill for those months.

Q. All right, sir. A. The one comment I would like to say, to say, in the complaint, I would like to, to speak to it, was the comment about:

"Pay it again."

That was by, said by, to Mrs. Craft, one of our employees. I would also, almost have to deny that as strong as I could, because our employees are trained.

Mr. Arnold: Your Honor, I object to the testimony.

The Court: Well, I'll sustain the objection as hearsay testimony and it will be disregarded in that particular.

By Mr. Bartusch:

Q. All right.

Mr. Mullen, let me ask you this. The Craft complaint alleges double billing. Do you know, do **[159]** your records reflect double billing? A. No.

Q. All right, sir. A. They reflect split billing.

Q. All right, sir.

Now, in other words, there were, as I understand what you have said, what basically, what Mrs. Craft said, there were two meters at her home, gas and electricity, and one water, right? A. Uh-huh.

Q. Is that what our records indicate? A. Yes.

Q. All right.

And she had, they had two different accounts, different account numbers, one ending in two and one ending in four? A. Uh-huh.

Q. And one of the account numbers was recording gas and electricity through that meter, and the other account number was recording gas and electricity through the other meter; is that correct? A. Right, uh-huh.

Q. That was actually electricity and gas consumed, not two bills for one supply of gas and electricity? A. That is correct.

[160] Q. All right, sir. A. The bill that she was paying had no water on it.

Q. Right.

They had one water meter? A. Uh-huh.

Q. Is that correct? A. Yes.

Q. Do our records reflect, Mr. Mullen, as to whether or not the Crafts went, went for any extended period of time without any water bill? A. Yes. They went from October until the matter was changed into their name, the four meter, the one ending in four, was first of all disconnected in January, and then this, we feel prompted them to come in and ask for service, and that service was connected—I'm sorry. I don't have the specific date on when that water was reconnected, but the meter was taken out at that particular time, because we had sent, sent out warning with the letter, an attempt to get an occupant wanted letter, an attempt to get the customer, to get the customer to come in and sign up for the registering. registering on this water meter. This is one of the extra steps we go through to get the customer to come in and sign, and in making the water meter —— (interrupted)

[161] Q. Mr. Mullen, I believe Mrs. Craft made some sort of statement after the meter was, was assigned, it helped relieve one bill or two bills, or three bills, something like that? A. Yes, sir.

Q. Now, what do our records reflect on this, Mr. Mullen? A. Well, well, now, these, again, is one of the unique situations. We feel like we are not responsible because what she did was combine the gas on the two bill, and combined the electricity on the four bill. She said the electricity was on, or goes on a combined total bill, on two bills.

Q. Who did that? A. The electrician did. As long as we were getting the readings on the two bills, we had to submit a bill, two bills, a bill for each.

Q. All right, sir.

Now, Mr. Mullen, with regard to Mrs. Craft, are you familiar with any of her visits to the Light, Gas & Water, or were you familiar with any of her problems and allegations in here before this lawsuit? A. Was I familiar with it?

Q. Yes, sir. A. No, huh-uh.

[162] Q. All right, sir. A. I would like to make one statement, if I may, regarding, again, coming back to the rudeness. One of our procedures that we installed to avoid as much of this as we can, and that is the fact that we do audit and monitor the telephone conversations of our people dealing with the public. So these people realize that their conversations can be monitored anytime to determine what information they are giving the customer, as well as how and what manner they are talking to the customer.

Now, many times their comments may be interpreted as being rude, because they are handling some, in some cases, up to seven thousand calls a day in our information center, with thirty-five to forty employees, and again, they are having to move through them as fast as possible to get to the next customer, and his problem. But we feel like our monitoring and auditing of these telephone conversations are effective, along with the training programs.

Q. All right, sir. A. Now, have you examined this other data —— (interrupted)

Mr. Arnold: (Nods head in the affirmative, upon motion from Mr. Bartusch of indication of **[163]** seeing same.)

By Mr. Bartusch:

Q. (continuing) ——I believe you have an additional and up-to-dated information on Willie C. Craft, is that correct? A. Yes, sir, uh-huh.

Mr. Bartusch: And I'll ask, ask that that be marked an exhibit for identification unless you have, unless, have you had an opportunity to review it, Mr. Arnold?

Mr. Arnold: Except I might point out, our client's name is Willie S. Craft, Your Honor, that is part of the whole problem. I will be glad to let Willie C. Craft's information be introduced.

Mr. Bartusch: Thank you.

The Court: All right.
Let it be introduced as Exhibit—— (pause).

The Clerk: Thirty-six.

The Court: Thirty-six.

(Whereupon, the said instrument was accordingly marked Exhibit number thirty-six and received in evidence.)

By Mr. Bartusch:

Q. All right, sir: Is this the up-to-date, your own **[164]** information on the Crafts' account, Mr. Mullen?

Mr. Bartusch: Are you finished (indicating to Mr. Arnold)?

Mr. Arnold: Yes, sir, go ahead. I'm going to keep this one then.

Mr. Bartusch: Well, I'll give him this one.

Okay.

A. I would have to agree that is one of our problems, because it is in the name of Willie C. Craft, as far as your record reflects.

Q. Okay.

Now, this additional and up-to-date information just brings her account current, is that correct? A. Yes, uh-huh.

Q. And what is her current status? A. Her account is in good shape, as far as paying her current bill, but she is not, they are not paying the balance. In fact, it is growing because, I believe it was one hundred fifty-four dollars about six months ago, perhaps, when we had the hearing here on her, and it has now grown to one hundred ninety-seven. So, they are not meeting their current bills, completely. They seem to be paying.

Q. Is she on any type of extended payment plan? A. No, uh-huh. She was on it in November of '73, **[165]** but it was violated in December of '73, and it was accelerated and it has been brought forward and going even beyond the order of the Court here that we continue services to these people if they would pay their current bills and work out their extended, and pay on their extended payment plan as agreed to, we left this service on.

Q. All right, now, Mr. Mullen. Your records reflect the billing date to the Crafts at 1019 Alaska, is that correct? A. Yes, sir, uh-huh.

Mr. Bartusch: Your Honor, I don't believe that these, the billing dates, I'm not talking about the termination notice which was attached to the answer, but the billing dates have not been formally introduced. There are a number of them, and I would ask Mr. Mullen to either read them to the Court, or by stipulation of counsel, that we could, that they be admitted, either way it is just about twenty dates that I would like to have in the record, indicating that the bills were sent.

The Court: Well, we'll afford counsel for the plaintiffs an opportunity to examine that matter and it will be considered as tendered, **[166]** subject to response or objection.

Mr. Bartusch: All right, sir.

The Court: I take it these are the twenty you are tendering, the twenty alleged billing dates?

Mr. Bartusch: Right; that is right.

The Court: On Craft?

Mr. Bartusch: That is right, Your Honor.

And that, as I said, was a part of the last exhibit marked for identification. It was included in that.

The Court: All right, sir.

By Mr. Bartusch:

Q. Now, also attached to the amendment to the answer, Mr. Mullen, was the termination notice of, termination notice, the dates that the division reflects that those went out in the Craft case. A. Yes, sir, they are on there.

Q. All right, sir.

Final notice mail is how you describe it? A. Yes, they were mailed in August, 21st, of 1973, September, October, November, December, January, February, March, April, and then again one was mailed the 20th of this month. They were suspended after the previous hearing up here, but this account, as I **[167]** indicated earlier, should have had activities on—— (interrupted)

Q. What do you mean? A. Well, the, well, the services should have been terminated because of the balance brought forward with no agreement.

The Court: Where is that shown, Mr. Bartusch?

Mr. Bartusch: The amendment to the answer has the termination date on it, Your Honor.

It is just one piece of paper, just one piece of paper, two pieces of paper there.

The Court: Well, I'm getting lost in all of these papers. I can't find that, and so I guess we had better have that tendered as an exhibit, even though I just simply—What exhibit number is it, to the amendment? I have Exhibit (a), Exhibit (b), Exhibit (c), Mr. Bartusch. I don't believe that it is tendered, I don't believe that is tendered, is it?

Mr. Bartusch: Your Honor, I believe the answer there was just one exhibit, which was set out, the various dates, yes, sir, that is what—Do you have that, Mr. Clerk?—Marked Exhibit J to the answer (continued on next page) **[168]** in trial Exhibit 11.

The Witness: Mr. Bartusch, I don't believe he will find that in it, this answer, this is an additional information that we are submitting now, final notice.

Mr. Bartusch: No, we attached those to the answer, Mr. Mullen. But you have some additional dates there, but we attached some dates on the Craft's and our amendment to our answer.

The Court: All right, sir.

We'll let that be. Is there any objection to the introduction of that matter?

Mr. Arnold: The only objection I see, Your Honor, is that we, we don't know where this comes from, and, and the—— (interrupted)

The Court: Well, I'll let it be identified at this time, subject to the right of cross-examination.

Mr. Arnold: All right, sir.

The Court: Check this with the Clerk.

The Clerk: Trial Exhibit Number 11.

The Court: Better mark it then with a letter designation as to the particular sheet that you are talking about. I mean, is it, that is the trial, the only sheet?

[169] The Clerk: Yes, sir, it is.

The Court: All right. Eleven, eleven for identification at this time.

(Whereupon, the said instrument was accordingly marked Exhibit number eleven with some sort of letter designation to it; same not having been announced in Court, this Reporter does not know the exhibit number for identification at this time.)

* * * * * * *

[179] By Mr. Bartusch:

Q. Hand you a copy of the letter which I have shown to Mr. Arnold and Mr. Daniel, which is addressed from, to Mr. Arnold from me, on account of Annie Funzie, and ask if her services

were terminated pursuant thereto. A. Yes, sir, they were terminated.

Q. All right, sir.

Mr. Bartusch: Your Honor, they, I believe they were handed Your Honor a copy before.

Mr. Arnold: That is correct, and, it is a letter I received and I will stipulate to that, that insofar as being necessary to be entered as an exhibit, Your Honor.

The Court: All right.

Mr. Bartusch: All right, sir.

Q. Mr. Mullen, two more things. I said that once before, you'd think we have about got it. We don't at this time, Mr. Mullen, as you have indicated, send **[180]** out notices in registered mail or by certified mail. We use the regular mail procedure, is that correct? A. Yes, sir.

Q. Have you investigated certified mail, Mr. Mullen, with regard to the possibility of the use of that or the cost of that? A. Yes, sir, we have considered this through the years on several occasions, but the cost, to get a receipt returned would be approximately, would be in excess of one dollar per letter, and this applied to the two hundred and two thousand notices that were sent earlier, and that our expenses are going up nearly a quarter of a million dollars, that quarter, and a million dollars will have to be picked up by our customers, again, affecting those who are on fixed incomes or low incomes percentagewise, much more than the other customers. It is the same people we are discussing here to the low income.

Q. All right, sir.

Mr. Mullen, one other question.

The complainant seeks a process whereby a hearing is available through a hearing officer with an individual having the right to be represented by counsel. Such procedure as that—

you are familiar with the complaint, I'm sure? **[181]** A. Uh-huh.

Q. Would that particular procedure in anyway increase the financial burden on the Light, Gas & Water? A. Definitely it would, because the experience we have had with arbitrators, in dealing with labor matters, they do come very expensive, and if you apply that again to anyone of the numbers I referred early, whether it be the forty-four thousand one-service cutoff offered, issued, whether it **supplied** (applied) to, **supplied** (applied) to the two hundred two thousand notices mailed, we're talking about a tremendous amount of money. We feel like we meet just about any program that is in effect in this country today, as far as allowing a hearing and working with a customer. Again, I reflect on our extended payment plan being one of the first that went into effect and has been looked at and adopted in parts throughout, as any other, other utility throughout the country.

Q. All right, sir.

Mr. Mullen, one more question and I believe that is it.

Is the cost of the division of electricity, gas and water going up? A. Yes, sir. Of course, we are having monthly adjustments on the electric bills, and yesterday we **[182]** had an approval by city council on the gas, which is the third gas rate increase this year. We are faced with several increases, even if we can continue to get gas, that is becoming a critical problem. So, at a time when we are having all these other forces closing in on us, we are talking about an additional charge here for certified mail, that arbitrators and special hearings and so forth, that would just throw an extra burden on those people that do pay the bill.

Mr. Bartusch: I think that is all I have, Your Honor.

The Court: All right, Mr. Arnold or Mr. Daniel.

Cross-Examination, by Mr. Arnold

Q. Mr. Mullen, when Mr. Bartusch mentioned the other day that there is a contractual relationship, this was in chambers, and you weren't there, of course, but there is a contractual relationship between the customer of Light, Gas & Water and Light, Gas & Water Division, how is that contractual relationship reflected, what is the contract and how is that made? A. It is not a signed contract because we again make the acquisition of services as easy as possible **[183]** for the customer, because we take most orders by telephone. We get as much information from the customer as we can and we are depending on that information being factual and feel like it is ninety-five per cent of the cases.

Q. This would explain having Mrs. Parks' name listed as Parker, because telephone contact was made rather than personal contact, is that correct? A. Perhaps so.

Q. And in other names that have been reflected wrong could have been done through telephone contact because that is, there is no signing, does anyone sign contracts with the division? A. On commercial accounts, we do have signatures, but on, not on residential.

Q. But on all of the accounts that are involved in this hearing, we don't? A. (Nods head in the negative.)

Q. You made mention earlier, and I would like for you to explain your definition of it, that you have to take all people who sign up, you reflected, this was reflected in some of your charts, that you have here, they are delinquent accounts, because you knew you were taking some bad risks, because you have got, apparently, a duty to sign all of those who apply for **[184]** utilities.

I wonder if you could explain on that and tell me what the duty is and perhaps the source of the duty in your regulation, or the laws, or whatever? A. Then, again, it is something that is not a contractual, when I said, "sign", that was a loose use

of the word, because we do take applications by telephone, we'll take applications from any customer that does not have a delinquent account with us.

Q. I'm sorry if I used the word "sign" in my question. I'm not trying to deal with the issue here. I'm trying to deal with the dealer of supply issue that you mentioned earlier. A. That is right.

Q. I would like for you to explain that, explain that on line? A. Well, take any customer that applies for service, if they do not have a delinquent account in the past, addresses are current——(interrupted)

Q. That is, is that the same as, that is set out in the charter that you referred to? A. Yes, sir. It is referred that we have the obligation to supply service to a customer.

Q. All right, sir. A. But then we do have the obligation to terminate **[185]** that service if the customer is delinquent.

Q. Is this also reflected in the manual, that, parts that have been introduced, some regulation promulgated under the city charter, and 1939 Act, as amended, what does the regulation say about this duty to supply? A. That we'll supply any person making application. Again, it is the same wording, "makes an application," if he is not delinquent.

Q. And the duty is there for you to do it? A. Yes.

Q. Perhaps it would take you too long to point that particular one out to us? Do you know—I'm not sure if we have gotten it, if it is, I don't want to take the time. A. No. I cannot go directly to it right now. In fact, I carried the files and manual back there.

Q. You can explain briefly and perhaps you have no other explanation, this would be particularly in reference to the Craft account, where there were two meters, another question of, along this same line, was Mrs. Parks, where she said there was inaccessible gas meter—What is the responsibility here of the

customer in terms of making the facility available for the division to plug in its metering devices? A. That is their total responsibility, to bring the **[186]** service wiring out of the house to contact the metering center and carry the—We will provide the metering center, but carry the wire up to what, what is considered, called, a weatherhead. We bring the service into the house and it is connected to the wire coming out of the weatherhead, and we plug in the meter.

Q. Is it a requirement that that be in an accessible place? A. It is now. But we do have some meters that are still in the basement, still inside of a house.

Q. And you have not made a requirement that they have to be moved? A. No, no, those, those, they are not in, not in here.

Q. All right, sir.

So, Mrs. Parks' statement that the gas meter was inaccessible did not violate any of your requirements, if it were already there? A. Other than the fact that the meter readers were showing consumption and they were read each month, so if it is in a pantry, that meter reader must be seeing through a wooden wall, or something, I would suspect that it was in a screened porch or something, because we would have a meter reading on a monthly **[187]** basis.

Q. But if, but if it were totally inaccessible, that wouldn't violate——(interrupted) A. No.

Q. It would be a duty, I assume, to make it accessible to being read, but it could be in an inaccessible place? A. Yes, sir.

Q. Could you explain, first of all, the sewer fees that are on each month's billing, is this something that is, is this a service provided by you for the city, or is this a responsibility of the division? A. It is a service provided for us, or provided to the city by us, under city ordinance, it states that we must collect

these service fees, and we can terminate services for non-payment of those too.

Q. And that is figured, I believe, on a percentage of the past water consumption? A. It is a graduate, not exactly a percentage, it is a graduated scale.

Q. Now, what about the city service fees, explain those. A. It is two fifty per residential house, or per residential home, or two dollars for apartments, and it is different for commercial, ranging from six dollars **[188]** up.

Q. Two fifty for a house and two dollars for apartments? A. Yes.

Q. So in the Craft bill of the city service fees, you were billing for a house because of the amount there were two dollars and fifty cents? A. Yes, sir. Okay.

Q. Both of these, if not paid, can result in the termination of all utilities? A. Yes.

Q. Just as failure to pay anything else billed to you, billed by you, I mean? A. We would not terminate a service unless the amount is twenty-six dollars or more, so it is highly unlikely that a service will be terminated for non-payment of these special fees. Normally it will be those incorporated with the utilities.

Q. Twenty-six dollars is the minimum amount for termination? A. Uh-huh.

Q. All right.

You have made mention in some of your charts that if a person is ill, utilities are not terminated. You have not made mention of how long that can go on. If **[189]** no payment has been made, I assume there would be a, theoretically, a situation where a person could be ill and never pay utilities, but there would be a cutoff at some point? A. There again, we have an extremely flexible policy, because each case must be treated on

its own merit and to answer your question, yes, sir, it could be, it could go on indefinitely, because of long-term illness of some nature; that perhaps require an artificial kidney or lung, or something like that, we would never cut off a service where one of those were in use.

Q. I failed, failed to get down completely, did you say that you startel as a lineman helper? A. Lineman helper, uh-huh.

Q. That was the first one. Would that be about the same category as a meter reader, in terms of pay schedule? A. Lower than a meter reader. A meter reader is an entry job, but it is on a higher scale.

Q. It is an entry job? A. Yes, sir.

Q. What is the educational requirement for being a meter reader? A. High school education.

[190] Q. And then after certain experience a person, if he does a good job, progresses, is that right? A. Yes, sir, can be transferred to other departments.

Q. What are the—what is the total number of employees which work for the division? A. Approximately thirty-four hundred.

Q. And how many of those work in the downtown office? A. We have approximately eight hundred working in and from the downtown office. For instance, your engineer may be in an office for a half day, out in the field half day, your meter readers report in the office, but they leave at eight o'clock, 8:05 or something like that, to go out to their routes, so, some eight hundred reporting to the downtown office.

Q. How many of those, if a person calls in, you have suggested several names that a person could get in contact with. It would seem to me it got to you very frequently. How many others, other people, approximately, is it possible, possible that a person may have, might have talked with in the division if a call is made? A. If a call is made?

Q. And transferred. A. It will come into information center, where we have some thirty-five or forty employees around the **[191]** clock. We'll, we'll say around the clock, yes, sir.

Q. And then it could be transferred to someone else? A. If it is a credit problem, that they cannot deal with such, such as a two or three day extension, then it is referred down to the credit department where we have approximately twenty-five people, as I indicated before, thirteen of these being credit counselors.

Q. And then it could go to Mr. Beck or Mr. Frost? A. Yes.

Q. And then to Mr. Xiques, or Mr. Harty? A. Yes.

Q. And then to you? A. Yes.

Q. Thirty-five or forty plus the number in the credit department, plus those mentioned, approximately fifty people are accessible, then, on a phone call about some problem with utility bill, is that your testimony? A. Yes.

Q. I have noted recently in the group, I believe, since the lawsuit was filed, that there was some change in the way the deposits are retained. Rather than refunded or something like that, did any of that **[192]** come into these cases at all, or can we disregard having to learn that? A. I believe we can disregard, because it was separate and apart from any of these cases, and it simply is a fact that we are retaining the deposit now where previously we were refunding it, where a customer paid, well, for two months.

Q. So, if we had a dispute about it now, at least we wouldn't have to learn that procedure, where we are having to learn a lot? A. Right.

Q. Now, you have heard the testimony, you were here at the earlier hearing, Mr. Mullen, I believe you were? I apologize for the question, having to ask it. A. (Nods head in the affirmative.)

Q. And you have heard quite a bit of testimony about people's failure to be able to get past initial people in the credit department, or in perhaps another department, customer service is separate from credit? A. Yes, sir.

Q. Is it not? A. Uh-huh.

Q. I believe the testimony has been from the plaintiffs, that they have not been able to get past the customer service and the credit department **[193]** personnel, to some of the other people that you mentioned in your interrogatories, and your further testimony here today. I say, that is what I remember, certainly, this morning, that would be one hundred per cent true, but that was the testimony?

Where is this notice written down, and informed to these people that they can call Bill Mullen if they have a problem? A. There is no procedure written down for them to call Bill Mullen.

Q. Is there a problem, is there a procedure that tells them that they can call Mr. Harty or Mr. Xiques or some of the other people that you mentioned? A. No, but that—— (interrupted)

Q. Is that written down and explained to anybody? A. No, sir, it is not, but by simply asking a question to whom may I speak about this, I'm not satisfied with it, they will be referred to one of these other people right on up to the Board of Commissioners. Again, that is an open meeting at two o'clock every Thursday afternoon, and a customer, if he will, if he will ask the question, avail himself, himself of this meeting, he can have his hearing right there.

Q. Now, if the customer is told to talk to someone **[194]** else at the same level, then, then he never can learn about this procedure, is that correct? A. He is not told to talk to someone at the same level. If a credit counselor—— (interrupted)

Q. We have had quite a bit of testimony that this happened to individuals, on individual questions, enough so that I think I can formulate that question, Mr. Mullen, and that is all I'm doing, doing. I said, if we have had a lot of testimony that way, there would be no other way for him to learn except for that person to tell, is that right?

Mr. Bartusch: Excuse me.

A. Yes, sir.

By Mr. Arnold:

Q. If a person has a problem with a bill, is told to see the other person in the customer service department at the same level, that person is, when he asked who can I talk to, then he has no way to learn that he can eventually talk to you, or to Mr. Harty, or to the Board of Commissioners? A. By keeping, by continuing to ask that question, yes, sir, he asks at the credit counseling level, and he, they will not be referred to another credit, credit counselor level. He will be asked, referred to Mr. Frost or, and if not satisfied there, he'll ask **[195]** can I talk to someone else, then he is referred to Joe Xiques, and then Frank Harty, and then to me, and I can definitely tell you that they can be told there that they can go to the Board.

Q. Word of mouth referral is the only way that they, that the information is conveyed? A. Yes, sir, the customer must ask for it.

Q. And your advertisements, and your newspaper accounts, and all of these things that you talked about, didn't deal with this issue; is that right? A. Did not deal with the chain of command?

Q. That is right, who can I see after the first unsatisfactory problem? A. No, sir. I think this is just common knowledge in any business, if you keep, if you can keep progressing right on up to the ladder, to the president, Board of Directors or what-

have-you, I mean, I don't think that has to be advertised. Does it? To answer your question, no, it is not advertised.

Q. Well, if you're asking me, I do have an opinion on that, yes, sir. But that was not in the advertising, the newspaper accounts, any of that? A. No, sir.

Q. That was concerning working out problems, and if you don't have the money to pay your bills? **[196]** A. And then we have made every attempt to get the people there at the first level that can work out these problems, and they did a beautiful job in ninety-five per cent of the cases.

Q. Now, again, you have introduced the charts advertising, dealing with the extended payment plan, which I might even ask you to characterize it, that is for persons who have already, who are already having financial difficulty, paying their bills? A. Yes, sir.

Q. But that is not advertised for the place to settle your disputes, is that correct? A. How do you classify a dispute? I mean, anyone that is complaining about his bill?

Q. I mean classifying disputes, claims in these lawsuits, as certain people claim they don't owe the bill, that they paid the bill. A. Was that the case here, these people recognize they owe the bill, but they cannot, just can't pay it?

Q. I recognize that being the case in all the plaintiffs, and that being the purpose of the lawsuit, where there is a dispute as to how to settle and dissolve the dispute. A. Well, then, what you are saying, every bill that comes in arrears is becoming a dispute because they **[197]** can't pay the bill?

The Court: Gentlemen, we are not here to ask legal discourses. The Court and the witness and the counsel are here to hear this case, and counsel will ask the questions and the witness will respond to the question with factual information, and the question will pertain to fact nature and not to legal opinions or otherwise.

By Mr. Arnold:

Q. The advertising and the extended payment plan are for helping people in financial difficulty as opposed to resolving disputes, is that correct? A. That is correct.

Q. Mr. Mullen, in the Craft case, we have introduced three different places, copies of the bills that are in question here.

Referring back to earlier questions that I had asked you concerning the city service fee, this was billed by you, by the division as a house, is that correct? A. Yes.

Q. And both on the account ending in zero two and in two four, a city service fee was billed to this house as a house? **[198]** A. Yes.

Q. If it were an apartment, you testified earlier that they would have been billed as, at the rate of two dollars, not two fifty? A. Uh-huh.

Q. Do you recognize that the billing of the house for a city service fee on both bills is a double billing? A. Yes, sir, but I don't recognize that is a departure from our procedure, because duplexes will be billed at a residential rate, as opposed to being billed at an apartment rate.

Q. Do any of the exhibits introduced, classify the Craft house as a duplex? A. Do any of the exhibits, no, sir.

Q. Is this an assumption that was made when the telephone calls were made? We talked earlier about the contractual arrangement, how that was arrived. A. I don't know that we have made an assumption here. We have just, you can have the two metering in any one house, it don't have to have that partition that was referred to earlier to get two meters, you can take any house in the city and split your metering.

Q. Would that then require, if I might, the metering on my house require my paying two city service fees? **[199]** A. Yes, sir.

Q. If I had one family? A. Yes, sir.

Q. Then the city ordinance never bases its city service fees on what the number of meters in the house? A. No, it is, each residential meter will be billed at two fifty.

Q. So, you are referring to two meters being attached to a residential dwelling, then they both, both will get the residential charge of two fifty? A. Again, this is not a procedure that is established by us. We are carrying out the requirements of city ordinances.

Q. Now, now, the city ordinance requires it to base that on meters, is that the number of meters there and not on the number of families living in the house? A. It says if you're metering this house for consumption of electricity, then attach a city service fee to it.

Q. And who designates whether that is an apartment in the house or duplex? A. Mr. Arnold, I'll have to beg off on that right now. The city has a department established where they take referrals on disputes, disputes like this, whether a person should be charged or not, or whether he has, is being charged too much, and we pass that on **[200]** to them.

Q. Which department is that? A. I'm sorry. I can't tell you the person involved, if it is——(interrupted)

Q. Would that be the same department to which Mrs. Craft was referred by the note which was introduced earlier? A. I believe so, yes, sir.

Q. It would be that department? A. These people have the name and department at their command. I don't. I'm sorry.

Q. After October 26th, 1973, three bills were sent to the Craft residence under each of the numbers involved. I believe on October 23rd, the evidence shows the meters were consolidated.

On October 26th, there was a meter reading at both, on both those meters, at the Craft's house.

Your earlier testimony was that the confusion resulted from the fact that the Crafts did not take the responsibility to get the four meter and the two meter separated; was that your testimony? A. Well, as you can see, the electricity meter was eliminated on the account ending with the digit two, and the gas meter was eliminated on their account ending with four.

[201] Q. So, so they continued to get two bills because it was not consolidated properly and they also got two city service fees? A. Yes, sir.

Q. Now, would you say that was improper, Mr. Mullen? A. I believe they were referred to this particular place at City Hall for discussion of that, and they probably could have gotten an adjustment.

Q. Then you are saying that you think that was improper? A. Yes, sir, uh-huh, I think they deserve an adjustment, and would get one, and will get one if they will contact the proper people.

Q. At least that particular point you see as a dispute between Light, Gas & Water and Mr. and Mrs. Craft, is that correct? A. No, sir, between Mr. and Mrs. Craft and the city.

Q. And all of the other double bills on the city service fee would be between Mr. and Mrs. Craft and the city, and not between Light, Gas & Water, who collected it? A. They make numerous adjustments throughout the month, so I'm sure this is one that will be considered. I cannot assure that it will be adjusted, but I'm saying a strong likelihood that it would.

[202] Q. Now, these amounts, when declared delinquent by Light, Gas & Water, are included in the extended payment plan that you previously referred to and did not become, for that purpose, a dispute between the city and the residential consumers, do they A. Are you saying—I'm sorry. I lost the question there.

Q. The first, the first bill, the first bill the Crafts received in the name of Willie C. Craft reflected a city service fee of seventeen dollars and sixteen cents.

You placed that seventeen dollars and sixteen cents under the extended payment plan, along with other items. A. (Nods head in the affirmative.)

Q. Is that right? A. Yes.

Q. And even though Mrs. Craft may have wanted to dispute that for whose purposes, it would not have been a dispute between her and the city, because, to continue to receive utilities, she had to enter into the extended payment plan. So, for some purposes, I'm saying, is it not a dispute between you and the consumers? A. I, frankly, fail to see the dispute between the **[203]** division and the customer.

Q. Although the customer is required to pay the seventeen dollars, which she disputes, you don't see, you don't see the dispute? A. Service will not be terminated for the seventeen dollars, it must be, it must go to twenty-six dollars, and as I said, we only are aware of one case where there is, well, aware of one case where this has caused a termination of service.

The Court: The Court doesn't follow the seventeen dollars and sixteen cents item on any of the exhibits. Are you gentlemen referring to any exhibit that we should be aware of in that respect?

Mr. Arnold: Yes, sir. I, I, the exhibit introduced as, I believe, Exhibit three, which is the Craft record of payment, Your Honor.

The Court: Is it a part of the answer, Mr. Arnold, amended complaint as well, and——(interrupted)

Mr. Arnold: I'm sorry. Exhibit two, Your Honor.

The Court: On this identification, it's two, and it says, "City service fee, seventeen dollars and sixteen cents."

[204] Mr. Arnold: On the twenty, on the account which ends in four, designated at the top of the page there, shows that the connection was effective 1-5-73, but was actually done, first bill of 6-27-73.

The Court: All right, sir. I'm with you.

Mr. Arnold: All right, sir.

The Court: This is the one you are questioning him about, the seventeen dollars and sixteen cents?

Mr. Arnold: That is correct.

Q. And this was put on an extended payment plan, wasn't it, Mr. Mullen, that seventeen dollars and sixteen cents? A. (Nods head in the affirmative.)

Q. Now, Mr. Mullen, do you have in your records, perhaps I didn't understand you on your direct testimony, or perhaps you confused the date, do you have that before you now, Mr. Mullen, that page to which I'm referring? A. Yes, sir. I'm trying to locate where it went on the extended payment plan, you said it did. I show a fifty dollar payment in July, on July the 24th.

Q. All right, sir.

Relevant to this page, Mr. Mullen, you carried **[205]** this account in the name of Fatheree, or Fatheree, until January, '73? A. Yes, January the 5th, '73.

Q. And then from January until May, it was not billed to anyone, is that correct? A. (No response.)

Q. And then was retroactively billed? A. The occupant wanted the, the occupant wanted letter was gone out because, again, the meter was consumed, found to consume, to be consuming.

Q. You didn't mail the occupant wanted letter yourself? A. Not me personally, no. The normal process was exercised.

Q. Was that reflected in the computer tape, or something that you personally identified, you said that would have been the normal process? A. Uh-huh, yes, sir, uh-huh.

Q. You are not able to specifically say that letter went out? A. No, I cannot specifically say that.

Q. It is possible, then, that was not discovered then until May, when the meter reader told Mrs. Craft about it and she testified earlier, that would also be possible; is that right? **[206]** A. Yes, sir. Things are possible, but that is highly unlikely in our system, because the meter reader is going by each month. We have no indication of an estimated bill here. So we are assuming that he went by each month.

Mr. Arnold: Your Honor, if I may have one moment.

The Court: Yes, sir.

* * * * * * *

[208] Q. Then the Craft's bill, when there were two, there was a light meter and gas meter, and a water meter, that, let's talk about first—After the date, does this not place some responsibility on him to designate that this account has a problem that needs to be dealt with? A. No, sir, absolutely not, because we have many, **[209]** many homes in the city with two meters on them.

Q. No, no, I'm talking about after October 26th. A. No, sir.

Q. Instead of the meter reading, putting gas on one and electricity on the other——(interrupted) A. It still don't, because a person, person may designate the electricity to be paid, certain persons living in that home, so he could have the meters separately, so there is no reason for the meter read to be alerted in this case.

Mr. Arnold: Excuse me one minute.

The Court: All right, sir.

By Mr. Arnold:

Q. Mr. Mullen, if I were to say to you that Mrs. Craft has a dispute with the Light, Gas & Water Division in that she disputes owing, owing for the gas that was on the meter that was turned off, those accounts all show no gas used, but a minimum amount billed for all of those months, in addition, she disputes owing but one city service fee, because there is one family living in one house, and then, were those matters cleared, she would dispute owing some of the cutoff charges that she would say were wrongfully done. Would you find any basis in her saying that is her dispute with the Light, Gas & Water **[210]** Company? A. I'm sorry, but I have got to answer that no.

Q. And so, if she, even if she had gotten through to the second line, or the third line, or to you, you are saying she wouldn't, probably wouldn't have been able to resolve that, even if this had happened? A. No, sir, because that is her responsibility to bring those meters together.

Q. Yes, sir, and I feel like—Well, I'm sorry, but at least if she could have gotten through to Bill Mullen, you could have told her this? A. She was told this, if, I'm just almost positive.

Q. Would that have been, would that have been a fair statement? A. Yes, sir.

Q. Would you consider that perhaps within the realm of service that you ought to provide for her, to say, look, Mrs. Craft, here is your problem? A. In conversation, yes, sir, I would say that I should know that, and I would say that all thirteen of those credit counselors know that, and all thirty-five to forty of those people in information center know that.

Q. But if—— (interrupted) A. And they are readily, readily tell people everyday.

[211] Q. But for some problem, for some reason, it wasn't communicated until the meter reader noted it; is that right? A. I cannot testify to that; no, sir.

* * * * * * *

[219] Q. What, during the first month that Mrs. Parks lived at the Coker Street address, what was her average monthly utility bill? A. Mr. Arnold, there would be no way I could tell that. We do have the meter readings for those dates, but we don't have the amount of money applied to the consumption. As I mentioned, consumption was shown each month as the meter reader went by and a contact wanted letter was sent to that address there.

[220] Q. The basis of your knowledge of this letter being sent is not the sending of the actual letter, is that right, Mr. Mullen-A. It is the knowledge of our procedure.

Q. Procedure. And that would be the procedure in that case rather than the knowledge of the particular, particular letter?

Do you have a copy of the letter that was sent to her address? A. Yes, sir. The contact wanted letter, yes, sir, I have a copy.

Q. That is a copy of the letter that was sent or form letter used? A. This would be the form letter used in going to all of the addresses in this particular circumstance.

Q. Does that show, Mr. Mullen:

> "Dear Occupant, you have used so much electricity, or gas, or whatever"—

Does it inform the person of that when you, when we don't know your name?

Do you mind reading that letter? I believe it is very short. A. (Reading):

> "You are using gas, electricity, water services at this address, but we **[221]** don't have a request from you for this service. If you have recently moved into these premises, possibly you overlooked this in attending to the many details of moving.
>
> Please contact our office within three days and make arrangement for this service.
>
> This can be done by calling customer information center, telephone number **523**-0711, and referring to the above account number."

which it does have the account number in the upper right-hand corner.

> "If these arrangements have not been completed by the end of this time, the division will have to disconnect these services.
>
> "We earnestly invite your immediate attention to this matter since we don't wish to inconvenience you in any manner.
>
> "Your cooperation will be appreciated.
>
> "Memphis Light, Gas & Water Division"

Q. Is it your testimony that is sent every month? A. The policy would be to send such form letter every month, yes, sir.

Q. But the termination did not take effect as the **[222]** letter said it would, is that correct? A. That is correct.

Q. That is the warning, a warning then, the termination notice, is it not? A. More of a warning.

Q. I mean since it was not terminated, it is more of a warning than a termination, is it not? A. It does not specify a termination date on there. It said they will be subject to termination.

Q. Was a termination notice sent to this address before the first billing on 2-26, which was mailed on March the 2nd? A. Absolutely not, no termination notice goes to an address where utilities are being used illegally or without a contract.

Q. If I said to you that Mrs. Parks had lived in the house five and one-half months at the time of the first meter reading reflected on the bill received and that was two hundred eighty dollars and thirty-four cents, and my recollection shows that to be fifty dollars and ninety-six cents, would you accept that as the average monthly balance? A. Sounds reasonable, yes, sir.

Q. I asked Mr. Daniel to check my poor mathematics too. Then the pay plan here which was set up by the **[223]** division, placed on Mrs. Parks a requirement to pay current utilities, in an amount more than the average monthly balance, which she had previously had, because certain, certain figures were not included in that fifty dollars per month on the plan and were brought forward, is that correct? A. Per agreement with the customer, I'm sure.

Q. And if the—I'm sorry.

On six—Now, where no utilities are being used, there would be no need ot send out a termination notice, is that right? A. No.

Q. But your, your records show that on June the 1st, '73, a disconnected was there, there was a disconnect of her utilities, and then on June the 20th, another final notice was sent out, is that correct? A. Some nineteen days after her utilities were terminated. We do show that a final notice went out on 6-20-73.

Q. That was some nineteen days after services had been terminated? A. Yes, sir, it is, and it could have been that this service wa: found back on, according to our procedure, we would have had a ten day check after June the 5th. We would have sent one out to verify **[224]** that meter or seal off, if the meters were found on, then they would get another notice.

Q. But you told us, me, just a few minutes ago that if they were on illegally, no final notice would be sent. A. On the

front end, because we don't have a person set up for this in this, for this account. Now, we have identified a person associated with this address and they very possibly could get a notice on.

Q. If your speculation is that the utilities might be turned back, is that reflection in your record? A. No, I cannot verify that.

Q. And I'm sure these four accounts have been given some very close scrutiny in the department, has that been, on her account, along with others, other accounts? A. They look into it very closely.

Q. All right, sir. A. Since that was put there, this is '73 here.

Q. But your speculation that they were turned on illegally, has no basis as far as the knowledge you have? A. Other than the fact the final notice went out.

* * * * * * *

[230] Q. Mr. Mullen, what was the procedure for Mrs. Holmes to follow to dissolve, resolve this dispute? A. She would have, would first contact the credit department. She would talk to her credit counselor. If she were not satisfied with her answer there, she could talk to a chief clerk. If not satisfied with that answer, she could talk to the supervisor of that department. If not satisfied there, she could talk to the superintendent. So, we have four levels.

Q. You left out going to the Board on **Tuesday** (Thursday). **[231]** A. I'm coming up to it.

Q. All right, sir. A. We have four levels on the first floor where most of our customer situations are handled. Beyond that, she can come to my office or any one of the managers on the fifth floor that would sit down with her and listen too with her, and listen to her problems.

Beyond that, I failed to mention yesterday, we do have one member of the Board that is a full-time member, a full-time employee of the division. She could talk to him personally. This is the president and then we have open Board meetings on Thursdays.

Q. And all of those methods of resolving that dispute are communicated only by word of mouth? A. At request, yes, sir.

Q. And there is no written procedures informing Mrs. Holmes of that procedure to deal with the various steps that you have just outlined? A. No, sir.

Q. I would like to get back to some other general type questions not related to the specific on the individual accounts.

You stated in direct examination that the telephone operator, or whatever terminology you used, **[232]** the person who answers the phone can grant three days extension of termination, is that correct? A. Delay in termination, yes, sir, uh-huh.

Q. Again, there, too, is not a written policy that is sent out to the customers, it is one that the customer finds out when he phones Memphis Light, Gas & Water Division; is that correct? A. That is correct.

Q. Could you tell us, please, the process involved when the customer calls and gets one of the telephone operators who can then grant the extension, what does that telephone answering person do, what was your term that you used for that person? A. Information center.

Q. Information center? A. (Nods head in the affirmative.)

Q. Information center. All right, sir.

I would like to use this information center which would have some thirty trunk lines, a customer could call into the information center and after some conversation, the person there grants a three-day extension? A. Yes.

Q. What does that person do? How is that carried out then to get to the meter reader so that the services **[233]** are not terminated? A. They have the machine to feed information into the computer and they can feed it in directly while they are talking to the customer on the phone to stop a cutoff from going out.

Q. All of these operators are trained in competent Board punching? A. Yes, sir.

Q. Whatever it is called. A. Yes, sir, to operate a keyboard.

Q. And so it goes immediately in and grants a three day extension from the operator itself? A. That is right.

Q. This process, again, is not reflected in your advertising or the newspaper articles or other things you brought out the other day? A. No, sir, only the telephone number requesting them to call the Light, Gas & Water, and tell us what their problem is.

Mr. Arnold: I'm looking, Your Honor, for Exhibit thirty-three, I have reflected as a chart. Here it is.

Q. The matter here of investigating thirty-three thousand, was this an annual figure, Mr. Mullen? A. Yes, sir, it is annual figures for 1973.

[234] Q. I'm sorry. Can you see it all right?

Mr. Bartusch: May I stand over here, Your Honor?

The Court: Yes, sir.

By Mr. Arnold:

Q. You stated on direct examination that after the thirty-three thousand investigations there were very few corrections? A. That is correct.

Q. I believe that was your statement? A. That is correct.

Q. Do you have a figure on how many corrections there were? A. No, sir, I cannot positively give you that figure.

Q. Can you tell me what would be the procedure for making those corrections, the person who investigated would tell whom and how would it be reflected on the customer's bills? A. Okay.

If the customer called in, or come in, or called into the information center, or come into the collection department, and complained that his bill is too high, the matter would be referred to our high bill complaint department. This high bill **[235]** complaint department can send out a customer serviceman to look into the matter to see if there is a leak. He can send out second, a person to, from the meter shop, to test that meter and to see that it is recording accurately.

Now, if it is found to be recording inaccurately, which is, again, a very minute amount of these thirty-three thousand, extremely small amount, the meters function very well. If that is so, then he would send a report in to the customer accounting department. We have a customer accounting department that is established to make these adjustments to the customers' account.

Q. These are all then investigations of mechanical or plumbing disfunctions, is that right, as opposed to a question like Mrs. Holmes would have had, she would have said, my bill is too high, investigation of the meters would not find out that she wasn't lying about that, I mean, that would have been in another department, is that correct? A. That is correct.

Q. This reflects checking the meters and checking for plumbing leaks. A. Right. More than plumbing leaks now.

Q. Could be such as, as electrical leaks too? **[236]** A. Gas.

Q. Yes, sir. Electrical leaks as well? A. No.

Q. Okay.

* * * * * * * *

[239] Q. We talked some yesterday about the illness matter—— A. Yes, sir.

Q. And you stated that from my theoretical question it would be possible that an ill person would never pay the utilities and would never have them cut off, I believe that was your answer, saying that it doesn't happen, you don't have such a written policy, but theoretically that could be true; is that right? A. Yes, sir.

Q. And what is the office procedure that is followed after the conversation and the meter reader is convinced, what does he do then? A. He will bypass the termination order that he has, making a comment on it, turning it in to his supervisor, who in turn processes this account onto the customer's accounting department, and it will fall in line for a "DCO" if payment has—I mean, delinquent cutoff of old, of all services, if payment is, has not been received in the five day period.

Q. And then a final notice is sent out? A. No.

Q. A final notice has already been sent out? A. That is correct, five days before.

Q. And then the person, meter reader would go back **[240]** if he found, found the person still ill, he would not implement the DCO? A. That is correct.

Q. What would he do then? A. He would turn in our report to customer account, customer accounting, with a notation on it, and this notation would be following, whether it means the customer will be in in five days to pay, whatever the customer has told him, if he will be in within five days to pay the bill, then it will be set up for action on the sixth day.

Q. Action meaning—— (interrupted) A. To get back into the termination process.

Q. He isn't sent any final notice? A. No; no more final notice, because this person has been in contact, and you have already mentioned three occasions where the cutoff comes, comes, customer has been extended.

Q. But the final notice reflects a date, you will be terminated on this date if you don't. Then you bypass that, then you come back, then he is never subject to termination, based on the reasonable termination notice, is that correct? A. I believe I have just said that this customer is on the turnoff plan. They have agreed that the **[241]** customer is going to do something within five days, seven days, that is noted on the cutoff order and it is processed back through and it will be established for cutoff one day after that, the agreement.

Q. Again, we can have, can, is there anything that is maintained on, or is this a normal thing, and the customer says that is our agreement, that is a unilateral, unilaterally agreed——(interrupted) A. Mr. Arnold, we have customer procedures set up for agreements. I don't understand, you know, every policy.

Q. I assume that is written down and the customer also has a copy of the written statement? A. No, sir; no, sir. They don't.

Q. The customer's recollection would be from the oral conversation and the Light, Gas & Water Division would be from the written record? A. Yes.

I must say there are many things that can alternate the agreement that we have with the customers. Mainly, the weather conditions, and I mentioned earlier, or if that customer calls in and talks to one in the credit department, and gives a definite date, that then that account can be blocked off indefinitely and everytime it comes out, out on the cutoff sheet, the **[242]** credit department reviews the cutoff sheet and they'll handle the blocked account on individual basis, according to the information they have on it.

Q. I would like to ask you now about the charts which are the guidelines for the extended payment plan.

Mr. Arnold: I'm looking, looking at Exhibit four, Your Honor, on the answer to the first set of interrogatories, pages

eight, nine and ten of Exhibit four, which are the charts, Extended Payment Plan A, the next chart, Plan B, and the next chart, Plan C.

(Passing instrument to the witness.)

The Witness: Okay.

By Mr. Arnold:

Q. Did you work devising these, were you on the team that worked out these charts? A. Yes, sir.

Q. A person—or the first question lists N151 is the first box in diamond shape, under Payment Plan A. A. All right, sir.

Q. Again, the diamond shape box lists N151 on Plan B. We have 151 through 400 in that same slot. These are monthly income amounts, is that correct? **[243]** A. Yes, sir.

Q. You have stated several times the flexibility and my question does not go to whether these are flexible plans, but I would like to ask, I find that in Extended Plan B and C, which are middle and higher income, perhaps Plan B is lower middle income, I'm not sure how to classify that, that it is possible to pay an initial payment of twenty-five per cent of the outstanding bills? A. (Nods head in the affirmative.)

Q. But in the plan which affects the Lewis' income, consumer, fifty per cent is the amount to be paid, and I would ask you what is the policy statement behind that, behind that?

Mr. Bartusch: Excuse me one moment.

If that is being asked as a question, first, I don't believe he has answered the question.

Mr. Arnold: All right, sir. I'm sorry.

Q. Would you, you would, according to the chart, the guidelines here, that would be an accurate statement, would it not? A. Yes, sir, it would be.

It appears to be accurate, what you are saying.

Q. And providing a five per cent, and then there are provisions for less than fifty per cent payment, **[244]** initial payments on Plan B and C, family, twenty-five per cent? A. After you have gone through several other functions here, tests, we'll call it.

Q. Yes, sir, correct. A. Of course, the overall rule applies again to fifty per cent. Now, an extension of three months, the overall guidelines.

Now, what you see here at five per cent and twenty-five per cent is several things that can come into play here. Normally, the person with an income of one hundred and fifty to four hundred dollars will be running up a much higher bill, so they are talking about an amount of substantially more than this person that is making one hundred fifty dollars or less. So, trying to hold down the bad debt experience, it seems that we should try to get the fifty dollars or the fifty per cent out of the one hundred fifty dollar customer, one hundred fifty dollars a month income customer, normally that bill, we are going to be talking about the, perhaps a thirty or forty dollar bill here as opposed to perhaps a one hundred twenty or one hundred fifty dollar bill, but, again, I cannot overemphasize the flexibility of the thing. These are simply guidelines, and they'll set down and work **[245]** with the customer anyway possible.

Now, if they have only one hundred fifty dollars income, I can assure you that they'll take twenty-five per cent and extended it over six months if that is necessary, if the customer requests that, they feel like, under the circumstances, after reviewing their expenses, and income, this is appropriate.

Q. But in Mrs. Parks' case, while she did pay less than fifty per cent down, it was not extended over a period of time where she could make the payment? A. That is correct, huh-huh.

Q. May I ask you now, it is Court's Exhibit fifteen, from the interrogatories, answer to the interrogatories, Exhibit four, the

second page, dealing with the extended payment plan, under who may apply. Do you have that, Mr. Mullen? A. Yes.

Q. First of all, all of these, I'm asking you, are these guidelines, themselves, published or sent out to the customer? A. No, sir.

Q. Are these guidelines as we have them here, printed up in anyway of your advertising? A. No, sir.

Q. The customer finds out about these guidelines only **[246]** by word of mouth, is that correct? A. By calling the number as shown on the poster, also by word of mouth from workers, from Map South and Welfare Department organizations such as that, have taken time to come in and learn our billing procedure because you have already indicated the procedure is complicated and it would be rather difficult to communicate our system to a customer by advertising. We have worked through groups like this, hoping these people will get out and explain the situation in the neighborhood, in the churches, whatever.

Q. All of the people I have mentioned, I have not mentioned to defend a small number of people, but all of the people you have mentioned, communicates this by word of mouth only, is that correct? A. That is correct.

Q. Under who may apply, could I assume that that could also include the failure of the division to bill for several months? A. Yes, sir.

Q. Although that is not written there, that would be included? A. No, sir.

Q. Since we are talking about their access to this **[247]** information, I'd like to look at Exhibits thirty-four and thirty-five just a second.

On there, Exhibit thirty-five, thirty-four, an advertisement, was this a bus advertisement, Mr. Mullen? A. That was bus, put in buses, as well as businesses, drug stores, small drug stores,

grocery stores, where they would permit us to put them, establishments like that.

Q. And this has, has several numbers on it? A. Yes, sir.

Q. One gets the **person** (information) to the people to communicate by these, the specifics of the plan? A. Uh-huh.

Q. And where was this advertisement, Exhibit thirty-five? A. This was put in businesses. I don't believe this one went on buses. I cannot be accurate, absolutely sure about that.

Q. And it does not have a phone number on that, Mr. Mullen? A. That, that is the reason the other one, this was, this one, was put out first, I believe.

Q. Mr. Mullen, I now refer to what is marked Court Exhibit seventeen, exhibit six to the answers, to the interrogatories, the second page. **[248]** A. Okay, sir.

Q. Which is Method and Procedures. Do you have that page? A. Yes, uh-huh.

Q. And I refer to answer number seven, or answer to interrogatory number seven, which you have, of course. Do you have the answer to interrogatories, Mr. Mullen, which you answered? A. Yes, sir.

Q. Your answer to interrogatory number seven.

Mr. Arnold: If the Court please, I'm going to ask Mr. Mullen to compare the two statements, and I would like for him to have a moment or two to look at them.

Q. Do you have the answer to interrogatory number seven, Mr. Mullen? A. Under what exhibit is it, may I ask you? I have not found it.

Q. No, it is on page three and four of the answer, and is not an exhibit. A. I'm sorry.

Q. Okay. A. Who designates when a final notice, before termination, is to be sent to a residential customer?

Q. Yes, sir, your answer to that? **[249]** A. I am specifically referring to the criteria, yes, sir.

Q. Your answer shows some additional statements. This exhibit number six has been introduced into evidence and I'm asking you is it incomplete? A. In what respect, sir?

Again, you are talking about a procedure within a department that is incorporated in here, that I cannot absolutely state that I know what every word in this means, or what every terminology referred to, how it is applied to the, at the division. If you will be more specific, I'll be glad to answer to the best of my knowledge.

Q. What department is this notice from? A. This is in, in the, in the exhibit six that you are referring to, that is Customer Accounting, I mean that is exhibit seventeen; Court Exhibit seventeen, and exhibit six in the answers.

Q. And in the left-hand corner it is Customers Accounting Detail, decision, and, where did you get your information to the answer to interrogatory seven? A. From the people in the credit department, credit collection department, Mr. Harty and his group.

Q. Mr. Mullen, did you go to the city code last night, as I did? **[250]** A. No, sir.

Q. Mr. Mullen, I would ask you, and I have a copy of the code, of ordinances of the City of Memphis, I would ask you if Chapter 19, Section 11 reflects the duty to collect the city service fee about which you testified yesterday? A. Yes, sir.

Q. Was this the reference you had? A. Yes, sir.

Q. Also, Chapter 19, Section 14, which is a few pages over, includes that duty? A. Yes, sir.

Q. I need to read a, I wish to read a portion of that into the record, but I need to look at this, if you will, sir. A. Okay, sir.

Mr. Bartusch: Your Honor, may I make one observation here? I'm not sure of the relevancy of the introduction of this city ordinance. If utilities were terminated for failure to pay the services for light, gas and water, I'm not aware that the sewer fee ordinance, per se, and the city service fee per se are involved as within the purview of this lawsuit now, and I would just raise that.

[251] The Court: Well, I will permit, I think, it to be read, Mr. Bartusch. You're not waiving any rights you have to objecting to whether it is relevant or material to any of the issues that are involved in the lawsuit.

Mr. Bartusch: All right, sir. I see.

The Court: You may proceed.

By Mr. Arnold:

Q. Section 19, Chapter 19, Section 11 is service fees for collection disposal:

> "The following monthly fees are established for the collection, removal or disposal of garbage and rubbish, residential units, including single family dwellings, etcetera."—

I would like to abbreviate here:

> "Two dollars and fifty cents."

I would hand you the code back and ask you, if I remember your statement yesterday, it was, the ordinance required a billing of the fee on each meter? A. (Nods head in the affirmative.)

Q. Is that what the ordinance requires, Mr. Mullen? A. Precise words, "family dwellings."

Q. And there is no reference in the ordinance to each meter, is that correct? **[252]** A. No, sir, that is correct.

Q. That is all I wish to ask you about. If you want me to take that cumbersome book back——

Mr. Mullen, Exhibit thirty-six, which is stated to be an additional and up-to-dated information concerning Willie C. Craft, we had, which you introduced yesterday, and which I believe you conceded should be to Mr. Willie S. Craft? A. No, sir, I did not concede that. I don't know the person's middle name.

Q. I see. I see. A. We have it on our books as Willie C. I think you did infer yesterday that some of these errors are by virtue of telephone conversation, but it can very easily be the same error made when the person is sitting down, because we don't ask them to show identification and/or driver's license, so they can tell us their name is Willie C. Craft in the office just as well as over the telephone.

Q. You are not saying that is what happened? A. No.

Q. You, you are saying, saying that is what could happen? A. Yes, sir.

* * * * * * *

[263] Mr. Arnold: I have ended my cross-examination of Mr. Mullen.

The Court: All right.

Mr. Bartusch: May I show him——(indicating)

The Court: Yes, sir.

[264] Do you have anything further of this witness, Mr. Bartusch?

Mr. Bartusch: I have one question, Your Honor.

Redirect Examination, by Mr. Bartusch

Q. Mr. Mullen, under **direct examination** (cross-examination), you were asked about the provisions of Section 19, 11, of the city ordinances relating to a monthly fee and I want to ask you with regard to that ordinance again, I'll just hand you Section 1914 and ask if that does not require that this item be included

as a separate item on each bill rendered by the division? A. Yes, sir, it does.

Q. Each month on bills rendered by Memphis Light, Gas & Water Division? A. Yes, sir.

Q. Thank you, sir.

Mr. Bartusch: That is all I have, Your Honor.

The Court: I have several questions, Mr. Mullen.

Is there any signed agreement entered into or any signature of a customer indicated or **[265]** taken on any extension agreement?

The Witness: Yes, sir. At the present there is. We do require a signature on this extended payment plan.

The Court: And when, if you know, was that policy begun?

The Witness: It was, it was implemented after the hearing, March the 5th.

The Court: Have you investigated the cost of the mailing of a certified letter without return receipt, but the mailing of a certified letter of notification with respect to termination?

The Witness: Yes, sir. There, that would be fifty-five cents each, I believe it is, I'm not positive, but it is fifty-five or sixty cents, yes, sir.

The Court: Have you investigated the possibility of charging a delinquent customer to make such notice as sending the cost of mailing a certified notice?

The Witness: No. We have not considered that procedure.

The Court: With that, if, obviously these are the bases of the substantial amount of your bad debt expense and obviously this might add to **[266]** the cost of bad debt expense too, but to the extent you charge it to a delinquent customer and were able to recover it, this would not be passed on to other customers in such event?

The Witness: That is right. We have many related costs to delinquent accounts that are not passed on to those individual customers, such as the serviceman going out and making a cut-off, that expense is spread over and all of the customers right now, but your statement is absolutely true, that it would be an added burden to those customers that are already in trouble. When it is a bill charged after, it would be charged after—— (interrupted)

The Court: The amendment filed, in the amended answer on behalf of the Light, Gas & Water Division, there are indications in some of the bills, "S.C." What does that mean, if you know.

The Witness: That is a service charge.

The Court: And how is that amount determined?

The Witness: The city service charge is two dollars and fifty cents for dwellings, where less than five, when it goes to five units, and one dwelling or one apartment complex, then it **[267]** goes to two dollars per unit.

The Court: So, a single unit, duplex, triplex, or quadplex is charged two fifty?

The Witness: That is correct.

The Court: And above that amount, the charge is two dollars?

The Witness: Excuse me.

The Court: City service fee is shown on the Willie C. Craft account, which is attached, in one place it is seventeen dollars and sixteen cents. How would that figure?

The Witness: Your Honor, I'm sorry, that is sewer charge, and it is governed by the usage of, I'm sorry, wait just a minute. Let me get the bill.

The Court: Well, I'm referring specifically in the account ending in number four on the page where it says: "Service C. Owed 1-5-73", which is a part of the exhibit A to the amended answer. I don't know what the exhibit number is in the cause, the beginning of the page is "Service C. Owed" in the name of Ed Fatheree, and then underneath that, the first set of figures show city service fee, seventeen dollars, sixteen cents; sewer charge, seventeen dollars and twenty-six **[268]** cents.

The Witness: Yes, sir. Of course, that was backing up back to January on that particular date, I haven't found it yet, but I do recall the incident you are, that you are talking about, and that is, as you recall it, it was picked up in May, so it would pick up back to January the 5th, when Ed Fatheree, the account was disconnected in his name and it carried forward one month, so the accumulation of seventeen dollars.

The Court: Are there charges made for disconnecting service and reconnecting?

The Witness: There is a disconnection for three dollars at the present time for one-service disconnection, and an additional four dollars fifty cents for disconnection of gas and water at the later date, so a total of seven dollars fifty cents, yes, sir, which, again, does not cover all of the expense affecting a cutoff.

The Court: And again, from whom are deposits required with regard to residential service?

The Witness: All residential customers now unless there is an agreement by one of our active customers with a good pay record—— (interrupted)

[269] The Court: How much is that?

The Witness: Twenty-five dollars still. We have considered increasing that on several occasions, and the average bill goes up, but our Board has chosen to leave it at twenty-five dollars because, again, this puts a burden on the people starting out in

many cases, perhaps in many cases, are the poor people, so it has been held to twenty-five dollars.

The Court: Suppose X deposits twenty-five dollars for service and is served for, for four months, and makes payments for four months and moved, moves to Jackson, Mississippi, what happens to his deposit?

The Witness: He will get it back with interest, receive it back.

The Court: Suppose X moved from one location to another location?

The Witness: Well, we'll transfer his deposit, his credit, his credit history will go with him.

The Court: Suppose he is delinquent in the amount of fifteen dollars at his old location, what happens?

The Witness: The twenty-five dollars will **[270]** be used to cover the fifteen and he will get a check for ten dollars.

The Court: All right, sir.
Any further questions, gentlemen?

Mr. Bartusch: No, sir.

Mr. Arnold: Along the line of the questions Your Honor asked about, the certified bills——

Further Cross-Examination, by Mr. Arnold

Q. Do you have any record of the number of people that, your termination people, are unable to contact when they go to the house? A. I believe the chart will demonstrate that we make contact on fifty-three per cent of the cases.

Q. Fifty-three per cent, you are able to make contact. A. Now, perhaps they are making contact on more, but they are not accepting the reason because, as shown on the chart, only forty-seven per cent are affected of the one-service cutoff that

go out, only certified mail, which, of course, I have looked into this, as I mentioned, through the American Gas Association, and this has not been an effective means, because a person does not necessarily come to the door and answer a postman delivering a letter, **[271]** especially if they are behind on their utility bill, so that it does not assure absolute notice by any means.

Q. The figure that you referred to, forty-seven per cent of the service cutoffs are made, is that what you said? A. Yes, sir, uh-huh.

Q. But that don't say whether they contact that forty-seven per cent or not, does it? A. It says that the other fifty-three per cent, at least, were, have been contacted. Yes, sir.

Q. And we assume a higher amount then had been contacted than—— A. Yes, sir.

Q. Than the fifty-three per cent? A. Yes, sir, because some of them will be refused after having been contacted.

Q. And have you investigated the cost of it at that point, sending to the number of people who were not contacted by person, certified letters, that it would be terminated? A. No, sir; no, sir. Again, we found out through the trade association that this is not effective.

The Court: Any further questions, gentlemen?

Mr. Bartusch: No, sir.

[272] The Court: You may step down.

Mr. Bartusch: That is all.

The Court: Any further proof to be offered in rebuttal by the plaintiffs?

Mr. Arnold: No, sir, Your Honor.

The Court: All right, gentlemen, I'll hear from you at this time with respect to your respective positions.

(Whereupon, closing statements were made to the Court.)

(The foregoing evidence was all of the evidence adduced upon the trial of this cause.)

ASSISTANCE AVAILABLE FOR MLGW CUSTOMERS

If you are having difficulty paying your utility bill due to genuine hardship and would like to work out a mutually satisfactory agreement for payment, the Memphis Light, Gas and Water Division has experienced and trained Credit Counselors available. These Credit Counselors are available to clear up any questions, discuss disputed bills or to make any needed adjustments. There are supervisors and other management personnel available if you are not satisfied with the answers or solutions given by the Credit Counselors.

Included in the balance shown on your final notice is an additional charge of 30¢ for the increased cost of certified mail.

METHODS OF CONTACT

a. Contact may be made by phone at 523-0711.

b. Contact may be made at the Credit and Collections Department, 220 South Main Street at Beale Street between the hours of 8:30 and 5:00 p.m., Monday through Friday, except on holidays.

c. Contact may be made at two neighborhood locations on a limited basis. These neighborhood locations are open from 3:00 p.m. to 6:00 p.m. five days per month at the following locations:

North Memphis: Greater Community Temple Church
Chelsea and Dunlap Streets

South Memphis: Sanders Drug Store
South Parkway and Lauderdale Streets

Customers living near the neighborhood locations are notified along with their final notice, the specific days that Credit Counselors will be available in these locations. (No phone calls accepted at neighborhood locations.)

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. 76-39

MEMPHIS LIGHT, GAS AND WATER DIVISION, et. al.

Petitioners,

V.

WILLIE S. CRAFT, et. al.

Respondents

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-39

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Petitioners,

V.

WILLIE S. CRAFT, et. al.

Respondents.

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United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A of Petition) is now reported at 534 F.2d 684. The opinion of the District Court is not reported, but is printed as Appendix B of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

1. Whether continued utility service is a property interest which is protected by the Due Process Clause of the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment and the Charter of the City of Memphis are set forth in Appendix C of the Petition.

STATEMENT OF THE CASE

This case was initiated pursuant to 42 U.S.C. §1983 on behalf of four plaintiffs alleging due process violations stemming from petitioners' terminations of service and refusal to initiate service. One plaintiff, whose discontinuance occured due to her failure to pay charges for usage "about which there was no dispute" has been dismissed. Craft v. Memphis Light, Gas and Water Division, 534 F.2d 684, 685 n.1 (6th Cir. 1976). Another plaintiff's claim (Ida Bell Holmes) that petitioners' refusal to initiate service to her was a violation of the equal protection clause was upheld by the Sixth Circuit and petitioners seek no review of that portion of the decision. Nor is review sought concerning the Sixth Circuit's holding with regard to Ms. Sarah Parks.

The remaining respondents present a factual situation of a municipally owned utility company terminating service when a bona-fide dispute as to customer liability exists. With respect to respondent Crafts (representing a family of 13) the failure of petitioners to provide any procedures for resolution of disputed billings (either before or after termination) resulted in at least four separate terminations of utility service due to petitioners' erroneous double billing for services rendered. It is from the Sixth Circuit Court of Appeals decision, holding that a summary termination procedure (as applied to respondents) was insufficient under the Due Process Clause of the Fourteenth Amendment, that the Writ

ARGUMENT

I.

There Is No Conflict Of Decisions
Of The United States Courts of Appeals

The singular issue[1] raised by this case is whether respondents possess a sufficient "property interest" in utility services to invoke the procedural protections of the Due Process Clause. In contrast to petitioner's representation to the Court, no current conflict with respect to this issue is currently present in the circuits. Two decisions alluding to the matter are in accord with the Sixth Circuit. Davis v. Weir, 497 F.2d 139, 144 (5th Cir. 1974), implicitly found a property interest in water service for purposes of the Equal Protection Clause, and Lucas v. Wisconsin Electric Power Co., 466 F.2d 638 (7th Cir. 1972), cert. denied, 409 U.S. 1114 (1973) assumed a property right in continued services, although holding that the private power company did not meet the "state action" requirement.

The analysis provided by the Third Circuit in Jackson v. Metropolitan Edison Co., 483 F.2d 754 (3rd Cir. 1973), aff'd, 419 U.S. 345, while alluding to the non-property status of utility services, 483 F.2d at 762, based its holding on the failure to successfully raise a 1983 claim in the absence of making the necessary showing of state action. 483 F.2d at 758-61. In affirming Jackson, this Court limited its decision to the state action question and expressed no opinion concerning whether utility service was "property" for purposes of the Due Process Clause. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 359. It is thus apparent that no conflict of decisions exists among the Courts of Appeals.[2]

II.

No Substantial Reason Exists
For Granting The Writ

The court below "implicitly assumed" that a claim to continued utility service constitutes "property" for due process purposes. Two decisions this past Term, however, clearly establish that the right asserted by respondents in this case carries with it the protections of Due Process. As such, the decision below does not present an important question of federal law not heretofore settled by this Court.

In Paul v. Davis, 96 S.Ct. 1155 (1976), the Court referred to its past approaches to defining property interests protected by procedural due process[3] and concluded that absent the deprivation of a right previously held under state law, invocation of procedural safeguards was improper. Again, in Bishop v. Wood, 96 S.Ct. 2074 (1976), the Court denied a public employee's claim to a due process hearing on the basis

---

[1] Petitioner attempts to raise collateral issues which are either: (1) of no constitutional significance; or (2) not properly before the Court. Being a municipally owned utility, there is obviously the necessary "state action" for a 1983 claim. While some argument is made concerning the constitutional scope of hearing procedures under the Due Process Clause, it is quite obvious that the complete lack of any grievance mechanism fails to meet the rudimentary requirement for informal hearings. See, e.g., Morrissey v.

[2] Also significant is the fact that a number of District Court holdings on the issue are in accord with the Sixth Circuit. See Koger v. Guarino, 44 U.S.L.W. 2528 (E.D.Pa. 1976); Condosta v. Vermont Electric Cooperative, Inc., 400 F. Supp. 385, 365-366 (D.Vt. 1975); Donnelly v. City of Eureka, 399 F. Supp. 64, 67-68 (D.Kan. 1975); Limuel v. Southern Union Gas Co., 378 F. Supp. 964, 966-67 (W.D.Tex. 1974); Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 447 (S.D.N.Y. 1972); Stanford v. Gas Service Co., 346 F. Supp. 717, 721 (D.Kan. 1972).

[3] As stated in Board of Regents v. Roth, 408 U.S. 564, 577:

[Property interests] are not created by the Constitution. Rather, they are created and their dimensions

that his employment --as defined by state law--was not a "property interest," i.e., the position was held at the will and pleasure of the state.

In contrast to these holdings it is clear that under Tennessee state law, respondents are entitled to services provided by petitioners after having paid required deposits and all charges validly assessed[4] by petitoners.[5] Crumley v. Watauga Water Co., 99 Tenn, 420, 41 S.W. 1058 (1897). It is well settled under state law, that a utility company is charged with a public duty of furnishing utility service to all inhabitants of the city of its location without discrimination and without denial except for good and sufficient cause. Farmer v. Mayor and City Council of Nashville, 127 Tenn. 509, 156 S.W. 189 (1913). Thus, petitioners, in terminating the utility service of respondents, have deprived them of a right or status which is recognized by state law. The Court of Appeals decision, therefore, is in accord with the recent decisions of this Court.

---

[4] With respect to this issue, it should also be noted that although not sanctioned by Rule 19, petitoner raises as a ground for granting the writ an alleged conflict between the Sixth Circuit and the Tennessee Supreme Court on the issue of whether the providing of utility service is a property right. The state cases relied upon, however, Patterson v. City of Chattanooga, 192 Tenn. 267, 241 S.W.2d 291 (1951), and Jones v. Mayor, Etc. of Nashville, 109 Tenn. 550, 72 S.W. 985 (1903), only relate to a loss of the "right" for nonpayment of correctly imposed charges, a proposition not disputed by respondents or the Court below.

[5] Accord, Lucas v. Wisconsin Electric Power Co., 466 F.2d 638, 646 n. 13 (7th Cir. 1972) ("right" to utility service pursuant to the Wisconsin code.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

Thomas M. Daniel

Thomas M. Daniel
Counsel for Respondents

Certificate Of Service

This is to certify that I have served upon opposing counsel this Brief for Respondent In Opposition by mailing a copy thereof to Mr. Frierson M. Graves, Jr., 2020 First National Bank Building, Memphis, Tennessee 38103 on this 6th day of August, 1976.

Thomas M. Daniel

THOMAS M. DANIEL

Supreme Court, U. S.
FILED
MAY 9 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-39

MEMPHIS LIGHT, GAS AND WATER DIVISION; CALVIN HENZE, HENRY T. WINKELMAN, ELIOT WHITTINGTON, ROBERT S. BOWERS and PATRICIA SHAW, Commissioners,
Petitioners,

v.

WILLIE S. CRAFT and MARY CRAFT, MS. IDA BELL HOLMES, MS. ANNA SUE FUNZIE, MS. SARA PARKS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The Opinion of the Court of Appeals, was printed as Appendix "A" of the Petition for Writ of Certiorari filed herein. The Opinion of the District Court for the Western District of Tennessee was not reported but was printed as Appendix "B" of the Petition for Writ of Certiorari filed herein.

JURISDICTION

The Opinion of the Sixth Circuit was filed on April 12, 1976. The Petition for Writ of Certiorari was filed on July 12, 1976. The Petition was granted February 22, 1977.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is utility service, including utility service without payment of charges, a property right which is protected by the Due Process Clause of the Fourteenth Amendment?

2. Assuming utility service is "property," must there be a prehearing termination procedure before cutoff or is the termination procedure of the Memphis Light, Gas & Water Division a constitutionally sufficient procedure meeting the minimum requirements of due process of law?

3. Are the cutoff policies of the Memphis Light, Gas & Water Division, a municipally owned utility, which operates in a proprietary capacity without governmental immunity but on a nonprofit basis, subject to the provisions of the Fourteenth Amendment requirements of due process?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment to the United States Constitution and of the Charter of the City of Memphis are set forth in Appendix "A" hereto.

STATEMENT OF THE CASE

History of the Litigation

The United States Court of Appeals for the Sixth Circuit held that utility service was a property right entitled to due process.

The Sixth Circuit further held that the "final notice" and extended credit procedures were constitutionally sufficient for a customer like Parks who asserted an inability to pay an admitted liability. The Sixth Circuit further held that the "final notice" forwarded to the customer with the enclosure that the customer having difficulty paying the utility bill is instructed to bring the bill to certain neighborhood credit counselors or to the Memphis Light, Gas & Water Division offices to discuss the utility payment plan was not constitutionally sufficient when there was a dispute as to the correctness of the bill.

The Sixth Circuit further held that the "hearing procedure" was not constitutionally sufficient for the Crafts, although sufficient for Parks who had an admitted liability.

The Sixth Circuit further determined that no class action was applicable.

The plaintiffs, as customers of the Memphis Light, Gas & Water Division, alleged in their suit that utility services were being terminated without due process of law. The plaintiffs filed suit on their own behalf and as a class. The Memphis Light, Gas & Water Division agreed not to terminate utility service of the named plaintiffs pending the trial on the merits so long as regular payments for current uses of utilities were made.

The Trial Court held that the Memphis Light, Gas & Water Division had not violated any of the plaintiffs' rights to due process of law. There seemed to be some implied holding by

the District Court that utility services represented property. The District Court suggested, but did not require, that the Memphis Light, Gas & Water Division change the notices of termination to provide more specific information about customer relations and disputes. This was done and the "Amended Notice" is set out in the Appendix, page 193.

There is no question before this Court concerning the equal protection claim of the plaintiff Holmes because of the Memphis Light, Gas & Water Division's error in refusing to initiate service because of past due bills of her common law husband. However, any holding of property on due process that would be applicable to the other plaintiffs would be equally applicable to Holmes or any other customers.

While the Sixth Circuit held that the final notice was sufficient for a customer with an admitted inability to pay and for which credit counseling for assistance in utility payment plans were available, the underlying question of whether such utility service is property is an issue before this Court.

Memphis Light, Gas & Water Division

The Memphis Light, Gas & Water Division is a division of the City of Memphis created by an amendment to the Charter of the City of Memphis. The President is appointed by the Mayor and approved by the City Council and required to devote his full time to the management of utility services. There are four citizen members appointed to the Board of Commissioners by the Mayor and approved by the City Council. This five member board is responsible for setting all rules and regulations and the operation of the Memphis Light, Gas & Water Division.

The Memphis Light, Gas & Water Division is a three service utility. It offers electricity as a distributor purchasing from the

Tennessee Valley Authority. The Tennessee Valley Authority is an agency created by act of Congress serving a geographical area of the country and providing electricity at the lowest possible rates. The gas division is a gas distributor purchasing from a pipeline subject to control of the Federal Power Commission. The water division operates the water distribution in Memphis and Shelby County.

The Memphis Light, Gas & Water Division has approximately 235,000 residential consumers of electricity; 200,000 residential consumers of gas; and 165,000 residential consumers of water. Some multiple dwellings have only one meter for water whereas there are individual meters for electricity or gas to the service customers. (App. 73)

As shown by the bills introduced, the Memphis Light, Gas & Water Division bills its customers monthly for electric, gas and water plus the sewer charge based upon usage of water and the City service fee which is to provide for sanitation services and collection of garbage. (App. 32-40)

The Memphis Light, Gas & Water Division is to operate on a nonprofit basis and was established for the purpose of providing low utility rates to citizens of the City of Memphis. The Charter provisions requiring the revenue to be used for certain operating expenses, capital improvements and other matters with any surplus required to be devoted solely to rate reductions is set forth in Appendix "A" hereto.

Billing and Termination Procedures in Question.

A customer who has a satisfactory credit experience with the Memphis Light, Gas & Water Division (hereinafter referred to as the "Division") may receive service for approximately ninety days before termination of his utilities (App.

113) A new customer or a customer with bad credit experience with the Division may have approximately sixty-five days of service without payment before there is a termination. (App. 115) A chart outlining the sixty-five day period was explained by the Secretary-Treasurer, Mr. Mullen. (App. 112-118)

The service area of the Division is divided into twenty-one cycles representing the approximate number of working days per month. Each cycle of meters is read on a rotating basis throughout the month and all meters are read every month except for unusual circumstances. If a meter in cycle one is not read because of bad weather or holiday or some other circumstance and in the next monthly cycle reading there is some other circumstance which would prevent the reading of the same cycle, the Division would skip cycle two and read cycle one on cycle two's day so that a meter is not skipped for more than one month for the purpose of providing the customer with the exact usage rather than estimating his bill. (App. 143-44)

The steps in providing and terminating service indicating the sixty-five day period are as follows:

Step 1

Service is connected upon request by telephone through the information center or in person at the Administration Building or at the Millington office. It is assumed for purpose of the chart that this took place on January 2. (App. 117, 156)

Step 2

If the meter reading date falls within five days after connection of service, no bill will be rendered. The first billing for consumption will be over a period of six to thirty-five days. It is assumed that the bill is read on January 31st. (App. 114, 117)

Step 3

The bill is mailed approximately four days after the meter reading date and the bill will be mailed to the service address or to any address designated by the customer. (App. 114, 117)

Step 4

As is indicated on the bill there is a net amount and a gross amount charged. The customer is advised of the last day to pay the net amount which would be approximately twenty days after the meter reading date or approximately sixteen days after the bill is mailed to the service address. (App. 114, 117)

Step 5

If the customer has not paid by February 25, or five days after the last day to pay net, and approximately twenty-five days after the meters are read, a red or final notice is mailed stating that services will be disconnected within approximately four days if no payment is received. The red or final notice (Exhibit F Appendix 43) is enclosed in an envelope to assure privacy of the customer. (App. 112) The final notice gives the specific date that services will be terminated if no payment is received or if some provision is not made for payment of the outstanding balance. Final notice will not be mailed if the customer owes less than $26.00 or the Division holds a deposit equal to twice the outstanding balance. (App. 73)

Included with this final notice is a "stuffer" or "flyer." For the fourteen cycles in which no neighborhood credit counselors are available the notice stated:

> "If you are having difficulty paying your utility bill and would like to discuss a utility payment plan, or if there is **any dispute** concerning the amount due, bring your bill to

the office at 220 South Main, Monday through Friday, or phone 527-0311." (emphasis supplied) (App. 137)

In the seven cycles in which there were neighborhood credit counselors the notice stated:

> "If you are having difficulty paying your utility bill, bring your bill to our neighborhood credit counselors for assistance. Your utility bills may be paid here also. (No phone calls accepted at neighborhood locations) . . .
> "You can also receive credit help at the main office at 220 South Main from 8:30 a.m. to 5:00 p.m., Monday through Friday, phone: 523-0711." (App. 45)

The Sixth Circuit stated that approximately one-third of the customers would receive notice of the well-publicized extended payment plan but would not receive any notice about settling "any disputes" since this was not mentioned on this notice.

Step 6

The meter reader will be utilized on March 1 to make a one service cut off of electricity. (App. 112) Cut off of service will not be made if, in response to a knock on the door, the customer states the payment is in the mail, shows a paid receipt or there is illness or hardship. (App. 125, 140, and Manual 63-66) At this point there can be a maximum of sixty-five days of consumption. Step 6 can be avoided if the customer will avail himself of the extended payment plan or contacts the Division requesting an extension of time to pay.

The records of the Division indicate that during 1973 43,000 persons were granted extensions or approximately 91% of those requesting extensions. (App. 126) The extensions would be posted directly into the computer by the telephone operator who had authority to grant extensions of up to three days. (App. 176-177)

Step 7

Approximately five days after the one service cut off (or the failure to cut off one service because of an extension for a limited period of time) the remaining services will be terminated (gas and water) if the customer has not paid the bill or made arrangements for payment. (App. 114)

There are approximately thirty-five to forty employees in the Information Center who receive telephone calls, including telephone calls requesting extensions for payment of bills. These trained and experienced employees are authorized to grant extensions up to three days for the payment of bills which would bring the person within one day of the total service cut off. (App. 126, 127)

The meter reader is instructed to knock on the door and to make every attempt to get someone to the door. If no response, then a green tag or door knocker is to be left at the door that is most obviously used for entrance to the premises. (App. 112) The language of the door knocker card is set forth in the Appendix, page 139 and Exhibit G (App. 44).

The meter reader has certain instructions so that if the customer claims that the bill has been paid and he has a money order receipt or if there is some hardship or sickness or if it appears the customer is on vacation, then no cut off is made of one service by the meter reader. (App. 64-66) An additional five days is allowed until the disconnect order (DCO) when all services are terminated. (App. 114)

The customer may pay the bill at approximately 100 locations throughout the city as well as the main office. (App. 113) The Division has arranged over the years to have the utilities paid at various stores and other locations for the convenience of the customer (App. 121) and if the utilities are paid before 4:00 p.m., service will be reconnected the same day. If not, service will be connected the next day. (App. 139)

During 1973, the records indicate that 3,100,000 bills were mailed and 202,000 final notices were mailed. (App. 124) This would indicate that a great number of people do not pay their utility bills within the approximately fifteen days allowed, but elect to pay them at a later time. (App. 124) Since, either through payments or extensions, only 47,000 one service cut offs were issued and only 22,000 completed, it is evident that the meter reader was either advised of payment or of some acceptable excuse to avoid the one service cut off. (App. 124) There were 26,000 all service cut offs issued which would indicate that certain individuals had received extensions but had not made the payments although only 62% or 16,000 complete service cut offs were estimated as made. (App. 125, 127)

The records indicate that through the main office, 62,000 customers contacted the credit department as well as 3,500 at neighborhood counseling facilities for credit or other assistance. (App. 127)

The Division further would accept and investigate any complaint of high bills and 33,000 were investigated in 1973 and cutoff procedures delayed during investigation. (App. 128)

Customer Relations

All of the billing procedures, collection procedures and extended payment procedures were designed as Mr. Mullen testified to keep the customer "on line" for the purpose of generating revenue for the utility in order to pay its expenses as well as to provide all the necessary utility services for the customer.

The plaintiffs failed to produce any other information from the records of the Division or from the Interrogatories to support any allegation of failure of a customer to be programmed to receive a final notice prior to termination. A final notice is mailed and personal contact made or attempted or a door knocker card is

left upon any termination. The records in this case do not support any finding that the Division was insensitive to the customer's needs for service or the customer's need for credit or the customer's need to resolve problems concerning complaints on high bills, utility service leaks, or other matters of adjustment handled through the credit office.

Extended Payment Plan

Advertising. The Division adopted in March of 1973 an extended payment plan to prevent utility disconnection of customers who were in a temporary period of financial hardship. The plan, with the various forms, are explained in detail in the procedure of New Credit Policy for Extended Payment Plan which is printed in the Appendix 46-60. The Division advertised extensively the extended payment plan to advise its customers. Some 400 spot announcements on the radio were made during the period of time of initial investigation and newspaper advertisements were taken in various newspapers. The Division's Speakers Bureau furnished speakers to church or civic groups and service organizations. Organizations working with low income individuals were forwarded information about the plan. (App. 118-122)

The Plan. A customer who is in a temporary period of financial adversity is advised by the "flyer" or "stuffer" with the final notice that he may request assistance either from the neighborhood credit counselor or from the main office. (App. 45) The extended payment plan has approximately thirteen credit counselors who have written guide lines. (App. 161) While there is some flexibility, the general rule is the customer is requested to pay one half of the bill for a single month and have the balance divided usually on the next three utility bills. Additionally, the Credit Department was given authority, by the written rules, to extend the time even further, up to approximately one year, in

extreme cases. After a payment plan is agreed upon, no further disconnects will be made so long as the customer fulfills his obligations as agreed to under the credit plan, a copy of which is given to him. His monthly bills show "extended payment plan" (EEP) together with the current billing. (App. 123-124, 46-63)

All the credit facilities are located on the first floor of the main office for the convenience of the customer. (App. 231)

The instructions for the meter readers are shown as Exhibit "2" to the Interrogatories concerning customer accounting which shows what to do about illness and other matters. (App. 64-66) The instructions for the customer service men for turn off and turn on procedures were attached as Exhibit "66-68" to the Answer of Interrogatories which indicate that the Division is to be courteous in making the turn off procedure. (App. 67)

Patricia Pintchuck

Patricia Pintchuck was not a plaintiff but was called to testify at the hearing for preliminary injunction. Her testimony indicated that when the meter reader came to turn off the services she advised the employee that her daughter was sick and he did not terminate the service. (App. 82-83) Miss Pintchuck stated that she knew that the Division did not usually make a practice of cutting off where there was a sick child in the house and the Division left the utilities on. (App. 83)

Mary Craft

The Crafts had a problem with their utilities as the result of the purchase of a house which had two electric meters, two gas meters and only one water meter. The residence had, in fact, been used as an apartment or a duplex and the Crafts received split billings. (App. 8, 21, 102, 147) Each meter registered the gas and electricity used in a particular portion of the house and the water meter was for the entire house. (App. 147) When the Crafts moved in, Mrs. Craft admitted there was a place like somebody had had another kitchen but she used it for a den. (App. 108) When the Crafts bought the property in October of 1972, they relied upon the seller who said don't worry about the meters. (App. 102) She did not know that the previous occupants paid two meters. (App. 85) She saw the two meters when they took over the house. (App. 98) She did not receive a bill for water services until June, 1973, when an employee of the Division, whose name is not known, told her that she was not paying a water bill. (App. 85-86)

When the Crafts moved into the house, Mrs. Craft asked that the utilities be transferred to Willie S. Craft. (App. 85) Whether this was for a particular address or whether this apartment had two addresses is not known but there were two accounts.

The records indicate that there were approximately 235,000 residential consumers of electricity as opposed to 165,000 residential consumers of water so that many multiple dwellings have one meter for water and unless specifically told of there being two accounts and of the charge for both, the Division would have no knowledge that the apartment was eliminated. (App. 73)

The records show that when the Crafts took over the utilities and service was connected on October 8, 1972, that they did receive gas and electric services but no water bill although they were receiving water. (App. 85 and Ex. A, pgs. 32-36) This did not appear to put the Crafts on notice that something was wrong. (App. 85)

The records indicate a disconnect order on January 5, 1973, in the name of Ed Fatheree and a meter reading date of May 29, 1973, which may have been the June date of Mrs. Craft

when she was told she was not paying for water. (App. 85 and Ex. A, pgs. 32-36) There was a disconnect made before the connect was made and the Crafts were billed back to January, 1973, for the water service although they had occupied the house since October of 1972. (App. 33) There was electric consumption used on each meter each month together with a minimum gas bill for one gas meter which evidently was for the connections in the second kitchen now not used but for which a meter continued to be maintained on the house. (App. 32-36, Ex. A)

Mrs. Craft testifies of coming to the Division several times to attempt to straighten out the matter and going to the owner of the house. (App. 90, 92, 102) She finally ordered the electric meter and the gas meter disconnected. (App. 94) The matter was further complicated because the electrician disconnected the electric meter for one of the accounts and the plumber disconnected the gas meter on the other account. The Crafts thus continued to receive two bills because of the mistakes of the independent contractors which was later rectified by combining the accounts. (App. 94, 101, 148)

The Crafts claimed no termination notices were received (App. 46) but the records of the Division indicate that termination notices were mailed or were processed by the computer for mailing on 8-21-73, 9-20-73, 10-19-73, 11-20-73, 12-20-73, 1-23-74, 2-21-74, 3-22-74 and 4-23-74 as shown by the Amendment to the Answer. (App. 62) The Crafts' utility bills became delinquent and finally an extended payment plan was arranged as shown by Exhibit "A" to the Answer. (App. 33) Mrs. Craft stated she did not know what she was paying in the extended payment plan. (App. 105)

Mr. Mullen testified that the Division had no responsibility to determine how many meters a customer had at the particular house and that it was the responsibility of the customer to combine the meters by using an appropriate electrician or plumber

as they desire. (App. 144-145) Mr. Mullen indicated that the Crafts, as testified, would have been referred to City Hall to adjust the City service fee and Mrs. Craft was told to go to City Hall, Room 607, for any such adjustment. (App. 96) Mrs. Craft was receiving the utility services and she was receiving split billing. (App. 147)

Ms. Anna Sue Funzie

Ms. Funzie did not appear to testify at the trial but evidence indicated, as shown by the District Court's Opinion (Petition for Certiorari, Appendix B, page 41), that she had had her utility services terminated by the Memphis Light, Gas & Water Division at least two times and each time service was reconnected by others, nonemployees of the Division and without the knowledge and approval of the Division and without payment of her delinquent account. Her services were connected at 968 Leath on September 21, 1973, and she moved from that address on March 13, 1974, owing $161.26 and had services connected at another address. She admitted in the Complaint that she received final notice and she paid nothing for her utilities. The Sixth Circuit comments in footnote 1 (Petition for Certiorari, Appendix "A", Page 22) that there was no claim of error on the dismissal of the Funzie claim; indeed, Ms. Funzie's counsel in his brief admitted that her utilities were terminated for failure to pay for current usages about which there was no dispute.

Ms. Sara Parks (Sarah Lee Parker)

Ms. Parks was listed in the Division's accounts as Sarah Lee Parker with her address at 1194 Coker. Ms. Parks moved into the house but did not receive a bill. When utilities are found in use and there is no person signed up for the account, occupant letters are sent to the address urging the customer to

come in and sign up or else a cut off is made. The occupant letter states:

> "Dear Occupant: You are using gas, electric and water service at this address but we do not have a request from you for this service. If you have recently moved into these premises, possibly you overlooked this in attending to the many details of moving. Please contact our office within three days and make arrangement for this service . . . If these arrangements have not been completed by the end of this time, the Division will have to disconnect these services. We earnestly invite your immediate attention to this matter since we do not wish to inconvenience you in any manner. Your cooperation will be appreciated." (App. 172-173)

Ms. Parks was first billed approximately March 1, 1973, and on April 26, 1973, after making partial payment, agreed to an extended payment plan. She failed to pay under the extended payment plan and termination notices were sent and she was terminated for nonpayment. (Exhibit "O" to Answer) (App. 41-42) The Court of Appeals had indicated that the final notice was constitutionally sufficient for a customer like Parks who asserts an inability to pay an admitted liability and received the notice to come in and discuss a utility payment plan with credit counselors.

District Court in Finding for the Division Suggested That the Division to Additional Measures

In accordance with the Memorandum Opinion, the Division submitted additional procedures, including a new notice, to go in all customer final notice mail outs and this notice was noted in footnote 6 of the Court of Appeals Opinion (Petition for Certiorari, Appendix "A", page 28). The full contents of the new notice, which was approved by the District Court, is in the Appendix, pages 193-194.

SUMMARY OF THE ARGUMENT

1. **The definition of property**

The issues before this Court are whether continued utility services is property entitled to due process protection and, if property, are the procedures of the Memphis Light, Gas and Water Division sufficient to meet due process requirements or if common law remedies are adequate to meet due process requirements.

This Court has defined property in general terms in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, and has used that definition in many cases to determine whether or not a person had a legitimate claim of entitlement to the benefit so as to make it a property interest. The Court has repeatedly held that property interests are not created by the Constitution, but are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understanding that secure certain benefits and that support claims of entitlement to those benefits.

2. **Utility service is not a property right.**

Utility service is not a property right in Tennessee and was so held by the Tennessee Supreme Court in *Patterson v. City of Chattanooga*, 192 Tenn. 267, 241 S.W. 2d 291. The Tennessee Supreme Court found the rule in Tennessee and insofar as it could find, the rule in every state in the union where the question had arisen that a public utility furnishing a water supply, either in a private or municipal capacity, may adopt reasonable rules, including a rule that the water so furnished may be cut off for nonpayment therefor.

The Memphis Light, Gas and Water Division contends that the common law right or entitlement is in the utility company

to terminate for nonpayment and there is no right of a user to continued services except upon notice and pretermination hearing.

The common law right of the utility to terminate for nonpayment is based upon the unequivocal theory that higher rates would result if the utility was required to go through standard collection procedures prior to cutoffs, the bills are relatively small in amount in comparison to the cost of collection and it would be discriminatory in that the paying customer would in effect be carrying those in default who were still receiving service. A utility's rules and regulations are built upon nondiscriminatory service to all customers based upon reasonable rules and regulations.

It is equally true that in rendering bills, the utility must give a reasonable payment date and that if not paid by the payment date, termination will be made. Utilities are under an obligation to furnish the services to all inhabitants at designated rates and without discrimination, but the utility is allowed to adopt reasonable rules for the conduct of its business and operation and such rules are binding upon the customers or patrons and may be enforced by the company, even to the extent of denying services to those who refuse to comply with them. This common law right is undisputed that a utility could cut off service for nonpayment of bills.

There is no common law right to protect the customer, but the common law right is in favor of the utility to discontinue and does not require continued service until termination by due process.

There is a distinction between a rule which requires a utility to cut off for nonpayment of bills after it has rendered a bill giving a reasonable time to pay as opposed to a rule which says that even after rendering a bill and giving a reasonable time to pay, there must be another notice and pretermination hearing before utilities may be discontinued.

3. **Decisions on why utility service is or is not property.**

The Sixth Circuit in its Opinion relied upon its prior case of *Palmer v. Columbia Gas,* 479 F.2d 153, where it implicitly assumed that continued utility service constituted property. There was no discussion of what statute, rule or other entitlement made such continued service property. The Sixth Circuit cited a number of cases which argue that utility services are essential to life and attempt to apply general statutes on the adoption of nondiscriminatory service or an analogy to other cases that once utility service is established, it cannot be withdrawn without due process. The Division believes that the municipality, as the owner of the utility, is not obligated to furnish services without charge and those who avail themselves of the utility services must pay for it or if not paid for within the reasonable time established to pay the bill, may be terminated thereafter for nonpayment.

4. **If continued utility services are property, the procedures of the Memphis Light, Gas and Water Division meet due process.**

The Sixth Circuit held that the final notice, together with the availability of credit counselors was constitutionally sufficient for a customer like Parks who asserted an inability to pay and admitted liability. The Sixth Circuit, however, stated that there was not sufficient notice to the Crafts who claimed a dispute nor was there a sufficient pretermination hearing available since they were not advised of the appropriate official to contact.

The Division respectfully submits that its procedures as outlined in the Statement of Case of approximately sixty-five days of service prior to termination with its final notice and indication that the Credit Department could be contacted is sufficient. The Division gives approximately fifteen days to pay the net amount, five additional days to pay the gross amount before a final notice is sent, five days additionally before there is any

cutoff and notifies the customer that he may contact the Credit Office. The Credit Office is a responsible part of the Division with responsible and trained personnel to answer all questions concerning the bill, including credit or request for adjustments. The Division, through its extended payment program, its regulations, including service manuals issued to employees, meets any minimum standards of advanced notice and a responsible company official to contact.

5. **The common law remedies available meet due process.**

This Court has recently decided *Ingraham et al. v. Wright, et al.*, — U.S. —, 45 Law Week 4364 (April 19, 1977), which held that at common law a teacher may impose reasonable but not excessive force to discipline a child. This Court stated that the traditional common law remedies are fully adequate to afford due process. We believe that the informal remedies available at the utility, as well as the formal remedies available, are sufficient to afford adequate due process. The customer may seek emergency or injunctive relief in the State Courts to forestall a disconnection. The customer may pay under protest and then sue for a refund. Thirdly, the customer may sue for damages for wrongful termination of services.

We respectfully submit that continued utility services are not property and that services may be terminated for nonpayment of bills without the necessity of notice and a pretermination hearing. If the Court determines that such utility services are property, we believe that there are adequate common law remedies available to the customer of the utility and further that the procedures adopted by the Memphis Light, Gas and Water Division meet the minimum standards of due process.

ARGUMENT

What Is the Definition of Property to Be Applied to Utility Services.

This Court has defined in general terms "property" in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 Sup. Ct. 2701, and has frequently quoted from this case in later opinions when resolving the issue of property. Property has been defined as:

> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."
> 408 U.S. at 577.

Just prior to that the Court has stated:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."
> 408 U.S. at 577.

The Court has further stated time after time that it will look not to the "*weight*" but to the "*nature*" of the interest at stake. The Court would look to see if the interest is within the Fourteenth Amendment protection of liberty or property.

The Court has also said that the range of interests protected by procedural due process is not infinite. See *Board of Regents v. Roth, supra*, at 570.

The Court has also repeatedly rejected the notion that *any* grievous loss visited upon a person by the state is sufficient to

invoke the procedural protection of the due process clause. See *Meachum v. Fano*, 427 U.S. at 224.

In *Roth* the Court found that a professor had no property interest even though he was deprived of his job, a loss which was surely a matter of great substance. There was no property or liberty in a prisoner's claim that he could not be transferred. *Meachum v. Fano*, 427 U.S. 220. *Bishop v. Wood*, 426 U.S. 341, found there was no property right in continued employment under an ordinance which merely conditioned an employee's removal on compliance with certain specified procedures and that the employee served at will and pleasure. In *Paul v. Davis*, — U.S. —, 96 Sup. Ct. 1155, the Court held that reputation alone did not implicate any liberty or property interest.

On the other hand the Court recognized in *Bell v. Burson*, 402 U.S. 435, 91 Sup. Ct. 1586, that the state by issuing driver's licenses recognized a right to operate a vehicle on the highways and could not withdraw this right without giving the petitioner due process.

Likewise in *Morrissey v. Brewer*, 408 U.S. 471, 92 Sup. Ct. 2593, the state could not alter the status of a parolee. The status or right was recognized by state law which was altered or distinguished.

Welfare recipients who had statutory rights to welfare so long as they maintained their qualifications had property right. *Goldberg v. Kelly*, 397 U.S. 254.

Good time credits accumulated under state law could not be denied without procedural due process since this was liberty. *Wolff v. McDonnell*, 418 U.S. 539.

Statutory created property interests were conceded by the United States in *Mathews v. Eldridge*, 424 U.S. 319.

In *Goss v. Lopez*, 419 U.S. 565, the Court found property in denial of a continuation of educational opportunity once the state had provided it for the child.

On the other hand, in *Lindsey v. Normet*, 405 U.S. 56, 92 Sup. Ct. 862, the Court found that due process was not violated by the Oregon Landlord and Tenant statute. Just as this case is dealing with utilities, the *Lindsey* case dealt with the right to retain peaceful possession of one's home and the need for decent shelter. This Court found that the Constitution does not provide judicial remedies for every social and economic ill and recognized the common law right to self help on the right of the landlord. Landlord and tenant or forcible entry and detainer statutes were passed to protect tenants as well as landlords and obviate resort to self help.

The common law right is not in the customer. The customer has the right to receive the utilities during the time that he pays therefor according to the rules and regulations of the company. The right is in the company to terminate upon reasonable, fair and nondiscriminatory rules and regulations which it adopts. There is no property right in the customer but the property right is in the company or utility which may terminate for nonpayment always knowing that a mistake in termination is at its peril.

Utility Service Is Not a Property Right.

Utility services are not property rights in Tennessee. The Tennessee Supreme Court in *Patterson v. City of Chattanooga*, 192 Tenn. 267, 241 S.W. 2d 291, held that the discontinuance of utility services (water service) did not deprive the owner of *property or property rights.*

The Tennessee Supreme Court was considering whether or not a water company may discontinue the water service for the

refusal of the property owner to pay the sewer service charge. The City of Chattanooga had required that all persons receiving water would pay a sewer charge based upon the amount of water consumed and therefore discharged through the sewer. The Court found that was a necessary incident to the use of water and that the regulation was proper.

In discussing the right to terminate services of a utility for nonpayment, it considered property and held as follows:

> "We next consider the question of whether or not the Water Company may discontinue the water service for the refusal of the property owner to pay the sewer service charge. Does the discontinuance of the water service deprive the property owner of property or property rights in violation of Article 1, Sections VIII and XXI, of the Constitution of Tennessee or the Fifth Amendment of the Constitution of the United States? 'The general rule is that those furnishing the public with its water supply, either in a private or a *municipal* capacity, may adopt, as a reasonable regulation for conducting said business, a rule providing that the water so furnished may be cut off for nonpayment therefor; and in pursuance of such regulation the water supply may be discontinued on the failure of the consumer to pay the water rates.' *Dodd v. Atlanta*, 154 Ga. 33, 113 S.E. 166, 167, 28 A.L.R. 465."
>
> 241 S.W.2d at 295.

The Supreme Court of Tennessee stated that insofar as it could find every state in the Union, where the question has arisen, has held in accordance with the above rule.

All states now recognize the privilege or entitlement of utility systems to discontinue service to a customer who has defaulted in payment for his services. This privilege or entitlement is based upon the unequivocal theory that higher rates would re-

sult if a utility is required to go through standard collection procedures prior to cutoffs, most bills being relatively small in comparison to the cost of collection. It is also apparent that continued service (or failure to cut off) after default would tend to create a loss of revenue and thus higher rates. The paying customer would in effect be carrying those in default who were still receiving service. Although the term "privilege" or "entitlement" has been used, it has been called not only a right but an *obligation* on the part of a utility to discontinue service for nonpayment.

The usual rules of private utilities and certainly the rules from municipally owned utilities in Tennessee clearly show that a distributor must necessarily give some type of cutoff notice to the defaulting customer. At least this is a *partial safeguard against liability*. Most public service commissions have adopted regulations which require a notice before cutoff and a reasonable time for the customer to pay the bill after receiving the bill or notice stating that utilities would be terminated unless payment was received by a certain date.

The Tennessee Supreme Court referred to two very early Tennessee cases of *Jones v. Nashville*, 109 Tenn. 550, and *Farmer v. City of Nashville*, 127 Tenn. 509, which held that water services could be withheld or terminated for failure to pay or to abide by rules and regulations and therefore this almost indispensable right to water was not property or a property right.

Jones v. Nashville, supra, held that the City of Nashville was correct in refusing to furnish water to an individual with an outstanding indebtedness or water bill. Linnie D. Jones sought damages for failure and refusal of Nashville to supply her with water. The City Water Company relied upon the ordinance which provided that she must pay her past indebtedness which she refused to pay upon proper notice and demand and there-

fore she had not complied with their rules and regulations. Linnie Jones contended that the ordinance was harsh, oppressive and discriminating to coerce and compel the inhabitants receiving water supply to pay past due indebtedness created for water furnished them by declining further supply until such indebtedness was paid although she was willing and ready to pay for the water desired. The Tennessee Supreme Court felt that every inhabitant of the City was secured a continuous supply of water by complying with the provisions of the ordinance and any person, regardless of their circumstance in life, will be refused water upon their failure to observe the conditions of the ordinance. The ordinance requiring payment of bills and past due indebtedness was plain and unambiguous. A notice was required to be given of the amount due and the time within which payment must be met before the supply is turned off; and no one can be taken by surprise or should be unprepared to meet their just dues for the service rendered them. The Court pointed out that prompt collection is necessary and the City would be put to the expense of a multitude of petty suits annoying to it and harassing to its inhabitants. It further held that the enforcement of the ordinance against Linnie Jones furnishes her no legal cause of complaint against the defendant.

In *Farmer v. Nashville*, 127 Tenn. 509, the Court held that Nashville could not deny the tenant water for failure of the landowner to pay a past due water bill. The tenant had wanted unmetered water services for a period of six months pursuant to the rules and regulations of the company. The Court further found that the requirement of the City that all unmetered assessments be paid in advance with ample protection against any loss on account of delinquent users.

Two even earlier Tennessee cases are cited with approval. *Watauga Water Company v. Wolfe*, 99 Tenn. 429, and *Crumley v. Watauga Water Company*, 99 Tenn. 420. In the *Wolfe* case, Wolfe had been a patron of the company accustomed to

leaving his hydrant open so that large quantities of the escaping water went to waste. His claim was that the water so wasted was *stale* and not fit for use, but the company thought the water not stale and the waste excessive. Wolfe applied for water again and refused to comply with the company's rule that the hydrant be kept closed except when using the water since he only thought the water to be "pure" when kept continuously running. The Tennessee Court upheld the right to deny him water holding that the rule was reasonable and Wolfe's refusal to comply with it disentitled him to receive the water.

The Tennessee Court outlined what are reasonable and general rules regarding a public utility whether private or municipal. It stated:

> "It is bound to furnish the commodity, which it was created to supply, to the City and all of its inhabitants upon the terms designated in its contract (the same being fair and reasonable), and without discrimination . . .
>
> "Though impressed with a public use, and under legal obligation to furnish water to all inhabitants at designated rates, and without discrimination, the defendant company is allowed to adopt reasonable rules for the conduct of its business and operation of its plant, and such rules, so far as they affect its patrons, are binding upon them, and may be enforced by the company, even to the extent of denying water to those who refuse to comply with them."
>
> 99 Tenn. 431, 432.

In *Crumley*, the plaintiff had been a patron of the company and in debt to them for Fifteen Dollars ($15.00). He had given his note which the Court calls his due-bill in settlement with the company. At a later time he applied for water tendering the price of one quarter's rent in advance according to the company's rules. The company refused and the Court, citing authorities, stated that a water works company was also a quasi

public corporation. It must supply water to all who apply therefor and offer to pay the rates. Since the water company had settled with him for his past due indebtedness by taking his note for the earlier period the water company must supply the water now.

The right to receive utility services is somewhat different from the right to have utility services extended for the purpose of serving a customer. The Tennessee Supreme Court in *Chandler Investment Company v. Whitehaven Utility District*, 44 Tenn. App. 1, 311 S.W. 2d 603, has held that a utility company is not required to furnish services to every person within the district but may require, under its reasonable rules and regulations, financial contributions for extensions to serve such property.

A utility company, by the nature of its creation, is to furnish the inhabitants of the City the service upon reasonable terms and without discrimination. The reasonable terms that it may adopt are nondiscriminatory rules and regulations and foremost among these rules is that the inhabitants shall pay their proper proportion of the expense of this service and upon failure the service will cease. The rules and regulations are binding upon the inhabitants or patrons of the service and may be enforced to the extent of denying the service to those who refuse to comply with the rules and regulations including payments for services.

The rules and regulations established by the Memphis Light, Gas and Water Division provide at least thirty days from the time that a bill is sent until time that services cease for nonpayment.

The customer's meter is read and within five days he receives the bill. He has fifteen (15) days to pay the net amount approximately and five (5) days to pay the gross amount before he receives a final notice stating that his services will be terminated in another five (5) days unless payment is made.

There is no statute which gives any property right or property in these utility services offered under these rules and regulations. The common law does not protect any such customer from these rules and regulations adopted so long as the rules and regulations are not discriminatory and are fair. In fact the common law is in favor of the utility to discontinue and does not protect the customer by requiring continued service until terminated by due process.

The evidence clearly shows that any customer could claim that his bill was in error and that he had a dispute. In fact, the concern of the Division is shown because approximately thirty-three thousand checks were made of meters and extensions granted because a customer made a high bill complaint and claimed possible error.

The Crafts and others in the original suit attempt to distinguish between termination for nonpayment and termination for a dispute. Utility services have been used whether or not they are correctly billed and procedures for termination, when we are discussing several hundred thousand customers, must be simple and uniform. The customer is advised of the payment date. The customer, from the time of his meter reading until payment date, has more than thirty (30) days upon which to bring notice or attention of errors to the company. Certainly adjustments were shown to have been made even in the meager proof introduced by the plaintiffs. The Division, however, showed the numerous checks of complaints and trained employees available in the Information Center and in the Credit Department.

The common law and rules and regulations concerning utilities have created a self help rule and that is termination for nonpayment. There is no common law nor statute in Tennessee which would make utility services a property right.

The utility, in exercising its right of self help and terminating for nonpayment, acts *at its peril* when there may be a dis-

pute between it and the customer. A recent case of the Tennessee Court of Appeals points out the rule for wrongful discontinuance. *Trigg v. Middle Tennessee Electric Membership Corporation,* 533 S.W.2d 730 (1976). The rule is stated by the Court as follows:

> "A company supplying electricity to the public has the right to cut off service to a customer for nonpayment of a just service bill and the company may adopt a rule to that effect. Annot., 112 A.L.R. 237 (1938). An exception to the general rule exists when the customer has a bona fide dispute concerning the correctness of the bill. *Steele v. Clinton Electric Light & Power Co.,* 123 Conn. 180, 193 A. 613, 615 (1937); Annot., 112 A.L.R. 237, 241 (1938); *see* also 43 Am.Jur., Public Utilities and Services, Sec. 65; Annot., 28 A.L.R. 475 (1924). If the public utility discontinues service for nonpayment of a disputed amount it does so at its peril and if the public utility was wrong (e.g., customer overcharged), it is liable for damages. *Sims v. Alabama Water Co.,* 205 Ala. 378, 87 So. 688, 690, 28 A.L.R. 461 (1920). Ordinarily the question whether the dispute between the customer and the utility was bona fide is for the trier of fact."
>
> 533 S.W. 2d at 730.

The customer had complained that he had not received in the mail his bill until after the due date when the penalty or gross amount became due and there was a dispute over One and 51/100 Dollars ($1.51). There was a series of letters exchanged until finally the utility company on August 19, while the customer was on vacation, sent another bill and stated that if the total amount was not paid the service would be discontinued by September 12, 1969. On the same date that the bill was sent, or August 19, 1969, and regardless of the notice, an employee of the utility company went for the purpose of disconnecting the electricity, saw the customer was absent and left a

notice stating that the service would have been terminated if someone had been at home. On the 26th, when the notice was still on the door, the service was disconnected by another employee and on the 27th the customer returned with considerable damage to his home. The question was before the Court of Appeals on the motion for judgment on the pleadings similar to the Federal Rule of Civil Procedure 12(c). The Court found there was a bona fide dispute and remanded the case back for trial on the merits. The Court went on to state:

> "We hold that in Tennessee, a public utility, when terminating service to a customer, must act reasonably when the discontinuance of the service might present an obvious danger of damage to the property of the customer."
>
> 533 S.W. 2d at 734.

The Court further stated that it did not hold that a public utility can never terminate service when a customer is absent nor did it hold that *actual notice* is always necessary. Here, however, it appeared from the pleadings that the dispute had gone on for several months and the utilities action in terminating service without actual notice when no one was home was unreasonable under the alleged circumstances.

The Tennessee Court is therefore continuing to hold that a utility company may terminate but, if it does so when there is a bona fide dispute, it may do so at its peril and be liable for any damages.

The right of any customer under the common law adequately protects that customer if there is a discontinuance.

A utility trying to serve customers fairly and without discrimination must reasonably enforce all of its rules. Its rules require that the customer be forwarded the bill and have ample opportunity to pay. Failure to pay is reasonable ground for ter-

mination and there is no property right in such utility services which would require that there could be no termination of utility services without notice and a pre-termination hearing. Neither the common law nor the statutes of Tennessee so require.

Reasons Cited Why Utility Service Is or Is Not Property.

The Sixth Circuit in its Opinion in this case (Appendix A, Petition for Certiorari) relies upon its prior case of *Palmer v. Columbia Gas*, 479 F.2d 153, and other cases of federal appellate or district courts to hold that claims to continue utility service constitute "property". The Sixth Circuit clearly admits that in the *Palmer* case, it *implicitly assumed* that claims to continue utility service constituted property. There is no discussion of what statute, rule or other entitlement made such continued service property.

In *Palmer v. Columbia Natural Gas*, 479 F.2d 153, the Sixth Circuit, in Footnote 12, stated that the company apparently conceded that its service is a specialized type of property which presents distinct problems in our economic system, the taking of which may impose tremendous hardship upon its customers. The Sixth Circuit therefore discusses no statute or other rule requiring that utility service be classified as property.

In *Davis v. Weir*, 497 F.2d 139, the Fifth Circuit indicates that the water company *conceded* on appeal that due process demands pretermination notice to the actual user while, on the other hand, stating that the plaintiffs do not contend that they are entitled as a matter of right to free water service or that an application for such service cannot be made subject to the payment of installation or metering charges or the posting of a security deposit indicating that under state law, the obligation to furnish water is conditioned upon the applicant's compliance with reasonable administrative rules and regulations. The Court

went on to hold that the tenant cannot be responsible for prior debt of the landlord which is what the Tennessee Supreme Court held in 1912.

In *Stanford v. Gas Company*, 346 F. Supp. 717, the District Court relied upon the Preamble to the Constitution to hold that whether the classification of utility service are rights, privileges or entitlements such life-sustaining services would seem to fall within the same constitutional protection afforded welfare benefits, wages, driver's licenses, reputation in the community and possession of personal property citing well-known cases of this Court. In *Hattell v. Public Service Company of Colorado*, 350 F. Supp. 240, the Court does not discuss property but whether state action was present thus requiring due process.

In *Bronson v. Consolidated Edison of New York, Inc.*, 350 F. Supp. 443, the District Court relies upon the Transportation Corporation's Law, Section 15, which provides that the company may terminate any person after five days' written notice. The Court then stated that since the state has undertaken to provide the service to the public, then it must comply with the requirements of due process before it can terminate access to such service or benefits.

In *Limuel v. Southern Union Gas Company*, 378 F. Supp. 964, the Texas District Court recognized that the plaintiff must have a claim of property as defined by the Constitution or laws. The Court then relied upon the Texas Public Utility statute which provided that it was the policy of the state that continuous service by public utilities furnishing . . . natural or artificial gas . . . to the public is absolutely essential to the life, health and safety of all the people and that the wilful interruption or stoppage of such service by any person or groups of persons is a public calamity which cannot be endured. The statute was designed to protect public utilities from disruption

by picketing, threats or intimidation. Likewise, the franchise from the City of Austin said that the company should establish and maintain first class and modern service. The Court therefore held that the customer had a legitimate reliance upon continued service even though the ordinance of the City contemplates the company's right to collect a reasonable price for the gas sold.

In *Donnelly v. City of Eureka*, 399 F. Supp. 64, the Court pointed out that the defendants had *conceded* that due process provisions of the Constitution require that notice and opportunity to be heard must be provided to water subscribers before termination of service. The Court stated that when a *municipality* is the sole source, this service becomes a constitutionally protected entitlement.

In *Condosta v. Vermont Electric Cooperative, Inc.*, 400 F. Supp. 358, the District Court cited *Board of Regents v. Roth*, 408 U.S. 564, and relied upon the Vermont law which was a general statement of the utility law that a utility company shall sell and distribute the same to any and all persons that desire to use the same within this state. The Court further stated that the plaintiff relies upon electric service in his daily life and cannot be questioned and that probably no other single utility service is so vital to a persons day to day existence.

In *Koger v. Guarino*, 412 F. Supp. 1375, the Court held that water service should be considered as indispensable to life and health and not simply a mere convenience of today's urban society. It found that the utility company was not constitutionally obligated to establish and maintain water service for the benefit of their citizens but that the Philadelphia Water Company, once having done so, a user has a legitimate claim of entitlement to continued service absent sufficient cause for termination consistent with the procedural protections of the due process clause. The Court relied upon the analogy stated

by this Court in *Goss v. Lopez*, 419 U.S. 565, that there is no constitutional right to public school education but once started then a state cannot withdraw the right without due process procedures.

In *Dawes v. Philadelphia Gas Commission*, 421 F. Supp. 806, the District Court distinguishes the decision of the Third Circuit in *Jackson v. Metropolitan Edison Co.*, 483 F.2d 754, aff'd; 419 U.S. 345, by relying upon *Goss v. Lopez, supra*, that once service is established voluntarily then it cannot be withdrawn without due process. The Court says that *Goss* effectively overturns *Jackson* that there is no constitutionally protected right to continued utility service once that service has been furnished even if, as *Jackson* also ruled, there is no constitutional right to utility service in the first instance.

Petitioners contend in all of these cases that the Courts have struggled to find reasons and have stretched statutes to hold that continued utility service was property. The Courts in some cases have indicated the parties have conceded the issue. Petitioners contend that the true rule is that the utility has the common law right to terminate services for nonpayment and this common law right has been placed in some rules of Public Service Commissions that a utility may terminate for nonpayment. The rule is to protect the utility and the remaining paying customers of the utility and that once the utility has forwarded the bill, with reasonable time to pay or else be terminated after the due date, there is no continued right or entitlement on behalf of the nonpaying customer. The fact that there is a hardship on a person because he does not have electricity, gas or water does not change the rule that it is the utility which is under an obligation to terminate for nonpayment in order to treat all customers fairly and on a nondiscriminatory basis.

The Constitution is not the cure for all social and economic ills.

On the other hand, several decisions have held that utility service or continued utility service is not property.

Jackson v. Metropolitan Edison Company, 483 F.2d 754, was affirmed by this Court on the ground that there was no state action. The Third Circuit held that the state was not obligated to furnish electricity without charge to its citizens. Those who wished to avail themselves of it must pay for it and the tariff provides reasonable notice must be given before termination. The Third Circuit relied upon *Lindsey v. Normet*, 405 U.S. 56, that there was nothing in the Constitution which allowed a tenant to occupy real property of his landlord beyond the term of his lease without the payment of rent.

In *Lucas v. Wisconsin Electric Power Company*, 466 F.2d 638, in an opinion written by Justice Stevens while on the Seventh Circuit Court of Appeals, it was noted that the plaintiffs made no claim that the defendant power company has any obligation to provide electric service to anyone who is unable to pay his bills. In discussing the fact that the plaintiff presently was indigent, Justice Stevens pointed out that the Supreme Court has explicitly recognized the importance of requiring all customers of a regulated public utility to pay their bills promptly in order to foréstall discrimination. See Footnote 9 at Page 645. The case was then decided on whether the utility company was operating under color of state law and found there was insufficient support and affirmed the dismissal of the suit against the electric company. The comments of Justice Stevens regarding the availability of other rights will be commented on later in this brief.

If Continued Utility Services Are Property, the Procedures of the Memphis Light, Gas & Water Division Meet Due Process.

If the Court decides that utility services are property and due process applies, then according to the often quoted phrase

of the Court from *Morrissey v. Brewer, supra*, "the question remains what process is due."

The Memphis Light, Gas & Water Division contends that its rules and regulations on billing and termination are sufficient. The Sixth Circuit held that the final notice *was constitutionally sufficient* for a customer like Parks who asserts an inability to pay and an admitted liability. The Opinion states that the Division had a rather well defined and well publicized extended payment plan to permit partial payments of certain delinquent accounts to forestall utility termination.

The Division contends that its final notice with enclosures, together with its Credit Department procedures, meter reader and service man procedures are sufficient both for admitted liability or any other claim concerning the utility service and that the customer coming to the credit office has a sufficient pre-termination hearing.

The Division's first bill is sent to the address designated by the customer and is adequate time for payment. There is an additional five (5) days after the net day to pay before a final notice is sent.

The final notice has with it an enclosure advising that the Credit Department is open to customers giving its location and hours. These credit counselors are experienced responsible employees designated to hear complaints. If one complains about the bill to any business, one goes to the Credit Department.

The telephone operators are service advisors and may grant extensions of time on the telephone of up to three (3) days to customers calling in who have received a final notice. These operators have direct access to the computer to forestall any termination.

The computer is programed to print customer cut offs for all persons receiving final notices and is further programed to

eliminate all cut offs when payments are made prior to that date.

The computer is further programed to eliminate cut offs from either the service advisors or the Credit Department when additional extensions are granted.

The meter reader has written instructions to contact personally the customer before making any cut off. He further has written instructions concerning when a customer appears to be on a vacation, when there is hardship or illness or the customer claims the bill has been paid. If the customer lies to the meter reader and payment has not been made then all three (3) services would be cut off if payment had not been received or satisfactory arrangements made five (5) days later when the service man makes the total service cut off.

The meter reader or service man is further instructed to leave the door knocker at the entrance which appears to be normally used so that the customer will be aware of the cut off and what he may do to reinstate services.

The credit counselors or credit office have trained personnel and, as shown by the record, do make adjustments and have supervisors available for consultations upon demand of the customer.

The record clearly shows that some of the plaintiffs such as Ms. Pintchuck or Mrs. Funzey either received extended payments or adjustments.

The Division contends that it more than meets the minimum due process suggested by Justice Marshall in his dissent in *Jackson v. Metropolitan Edison* when he stated:

> "Accordingly, I think that at the minimum, due process would require advance notice of a proposed termination

> with a clear indication that a responsible company official can readily be contacted to consider any claim of error."
>
> 419 U.S. at 373.

Utility services are still a bargain. An example is the Crafts' bills which, even though separate, show that utility services furnished to them for their house in which twelve or thirteen people live were reasonable. For example, for the typical summer month of July, 1973, the service shows that from June 27, 1973, the total of the two accounts for gas, electricity, water, city service fees and sewer charge totaled Fifty-Four and 87/100 Dollars ($54.87) or less than Two Dollars ($2.00) a day. When the Crafts were receiving two bills for the month of December, 1973, or the meter reading dates of November 27 through December 28, the total was Forty-Nine and 83/100 Dollars ($49.83) or approximately One and 75/100 Dollars ($1.75) a day for their three (3) utility services plus sewer and service fee. When the services were combined for the winter month of January 29th through February 27th, the total for gas, electricity, water, city service fee and sewer charge was Forty-Three and 03/100 Dollars ($43.03) or about One and 50/100 Dollars ($1.50) per day. Utility costs have risen and will continue to rise but utility services such as water are extremely low for the benefits received whereas gas and electricity are probably less now than their costs thirty (30) or forty (40) years ago in comparison with the wages or income of the homeowner.

The Division accepted the suggestion of the District Court and revised its notice to be sure that every person not only could ask for extended credit but could discuss any dispute with the credit counselors and that supervisory personnel were available to answer any further questions.

Counsel would report to the Court that although certified mail was used, the Division suggested that if the customer were

not home the Post Office merely leave the letter and mark on its form delivered as ordinary mail so that there would be evidence of delivery. Since that time there has been a dispute between the Postal Union and the Post Office officials so that no such notice would be marked and, after a short trial period of using certified mail only, the Division has advised the District Court that it will use ordinary mail on its final notice rather than certified mail. This was consented to by the attorney for the plaintiff since a survey showed that approximately fifty percent (50%) of the persons did not sign for the certified mail and less than half of the people went to the Post Office to pick up their certified letter before the termination would be effective.

The Division respectfully submits that if utility services are property its procedures for notice and some type of pre-termination hearing meet the minimum standards of due process.

Are Common Law Remedies Sufficient Due Process?

The Memphis Light, Gas & Water Division we contend has demonstrated an enlightened policy of dealing with persons in financial difficulty and in providing accurate and efficient service to its customers. Unlike *Palmer v. Columbia Gas, supra,* the District Court, in its opinion, distinguished the many practices which were found callous with the efficient and enlightened practices of the Division.

The Division read every meter every month and if unusual conditions prevented the reading of the meter for one month it was read in the next month even if it meant averaging another cycle so that no customer would receive a "surprise". The Division maintains 35 to 40 trained service advisers who receive telephone calls and are empowered to granted extensions (91% or 43,000 granted during 1973) and further insured that there was an investigation of high bill complaints. In fact, the records

of the Division indicate that cutoff procedures were delayed and investigation of high bill complaints were made of 33,000 customers during the year 1973. The Division had adopted reasonable rules for notices of its termination as shown by the final bills.

The Division had also sent to all customers with the final bill a flyer that if there was any difficulty on payment or if there was a *dispute*, the customer could contact the credit office at the main office of the Division. It is ridiculous to state that the fact that there was not the magic word "dispute" that a person receiving a final notice together with a flyer stating that if he had difficulty in paying he should contact the credit office that the customer would not know to contact the credit office if his difficulty in payment resulted from his *dispute* as to the *correctness* of the bill.

In any event, we believe that the common law rights available to the customer were fully adequate to afford due process. This Court in the recent case of *Ingraham et al. v. Wright, et al.,* — U.S. —, 45 Law Week 4364 (April 19, 1977), held at common law a teacher may impose reasonable but not excessive force to discipline a child and that such an interest was liberty and protected. The Court, after having decided that the interest was protected, must decide what procedures constitute "due process of law." The Court then stated:

> "We find that corporal punishment in public school implicates a constitutionally protected liberty interest, but we hold that the traditional common law remedies are fully adequate to afford due process."
>
> 45 Law Week at 4369.

This Court has repeatedly pointed out that it has rejected the notion that *any* grievous loss is sufficient to invoke procedural protections of the due process clause. The Court has

stated it looks not to the *weight* but to the *nature* of the interest at stake.

The interest here is the continued use of a utility service whether water, electricity or gas.

The service has been provided on a non-discriminatory basis under the decisions of a common law that a utility must provide fair and non-discriminatory service equally to all persons, including the common law provision that a utility could cut off service for nonpayment of bills. In fact, Justice Stevens states this in *Lucas v. Wisconsin Electric Power Company* when writing that opinion for the Seventh Circuit when he stated in Footnote 15

> "It is undisputed that at common law a utility could cut off service for nonpayment of bills."
>
> 466 F.2d at 647.

The Courts generally and the Tennessee courts have recognized the informal and formal remedies that are available to a utility holder. The first are the informal remedies established by the company. The Division has established that prior to cut off for nonpayment of utility services, the customer has fifteen days from the date bills are mailed to pay the net due. The customer is allowed five additional days after the last day to pay the net before a final notice is mailed. The final notice advises that utilities will be terminated for nonpayment and that if not paid by 5:00 P.M. on the date, the service will be disconnected. Enclosed within the final notice bill is either one of two flyers or stuffers indicating that if there is any problem or dispute, the credit office should be contacted or, in case of bills going to low-income neighborhoods, there is the statement that credit counselors are available in the neighborhood. The Sixth Circuit placed great emphasis on the fact there was no mention of the word *dispute* on the flyers to low-income areas but we believe

that the notice advising of credit counselors would certainly advise the person to come in whether or not there was a dispute or there is merely difficulty in paying. Certainly, the records of the Division indicate that 62,000 customers contacted the Credit Department although it is unknown if some of these required adjustments because of errors. Certainly, there was an adjustment on one of the plaintiffs involved in this lawsuit.

Most credit disputes would be resolved by the Credit Counselors.

The formal remedies available to a customer were set forth by Justice Stevens in *Lucas* and such remedies are available under the common law. There are really three in number.

The first is the customer has the right to seek emergency relief in the state courts to forestall a disconnection. The second is the customer may pay under protest and then sue for a refund. The third, as demonstrated by the holding of the Tennessee Court in *Trigg, supra,* is that the customer may sue for damages because the company wrongfully cut off the service. This again is the common law remedy.

The Courts, in discussing property, have looked to the customer. The common law entitlement or right was that established for the *utility company,* that is the right to terminate services for failure to pay. The Courts have attempted to turn around this method of self-help to indicate that it is the entitlement of the customer for continued service once the utility company, whether private or public, extends the services under either the regulations of a public utility commission or the regulations of the city or entity which owns the utility.

The utility has the right of termination which it may exercise at its peril.

The Memphis Light, Gas & Water Division respectfully submits that the customer has sufficient common law protection adequate to afford due process.

State Action.

The petitioners presented for review the question of whether the cut off policies of a municipally owned utility operating in a proprietory capacity without governmental immunity but on a nonprofit basis should be subject to the provisions of the Fourteenth Amendment requirements of due process.

Counsel realizes that the Division as a municipally owned facility constitutes "state action."

Counsel in this question really meant to state that the Memphis Light, Gas & Water Division could not adopt any procedures or rules which were discriminatory. It must adopt fair rules to extend service to all customers, including rules for payment and for reasonable extensions under certain conditions. It must further adopt reasonable rules to terminate services to a customer. These rules are established not by municipal ordinance or state law but are really codifications of the common law rules and regulations directed towards utility or other monopoly types of business. The Division, under its Charter, has the authority to adopt "reasonable" rules and regulations. The law has always recognized that when a municipality enters into a traditionally proprietory function it is subject to suit by its customers for denying services, terminating services or for failure to extend services. The utility must adopt rates which are nondiscriminatory and is subject to suit concerning the adoption of such rates. It operates in all ways similar to a private utility except that it is municipally owned and, in most cases, a nonprofit organization.

We feel, therefore, that the Court should not find that the utility services offered by a municipality are, therefore, in and of itself, "property rights" merely because of the municipal ownership. This seems to be the reasoning of some lower court decisions.

CONCLUSION

We respectfully request that this Court hold that there is no property interest and dismiss the Complaint of the plaintiffs. If the Court finds there is a property interest, we respectfully request the Court to find that there are adequate common law remedies available to afford due process.

In the alternative, we request the Court to affirm that the final notice and hearing or credit plans for persons with admitted liability, such as Mrs. Parks, are constitutionally sufficient and should be affirmed. We further request the Court to reverse the Court of Appeals and find that the notice and hearing provisions for any person with a disputed bill for any reason are sufficient.

Respectfully submitted,

FRIERSON M. GRAVES, JR.
Counsel for Petitioners

APPENDIX

APPENDIX A

AMENDMENT 14

§ *1. Citizenship—Due process of law—Equal protection.*— All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 683. Rules and regulations of commissioners.

Said board of light, gas and water commissioners shall have the power and authority to promulgate and enforce such rules and regulations governing the distribution of light, power, gas and water, as they may deem proper in the operation of said light, gas and water division. (Priv. Act. 1939, ch. 381, § 8)

Sec. 691. Disposition of revenue of light division.

The revenue received each year from the operation of the light division, before being used for any other purpose, shall be used for the following purposes, in the order named, to-wit:

(1) The payment of all operating expenses of the light division for the year.

(2) For interest accruals and sinking fund accruals on bonds and mortgages issued for the benefit of the light division.

(3) For cash payments to a working capital reserve, a renewals and replacement reserve, and a casualties reserve, for the benefit of the light division, said cash payments to said reserves to be in such amounts as the light, gas and water commissioners think proper and by resolution elect to set up from time to time.

(4) For payment to the general funds of the municipality a sum equal in amount to what would be the city taxes on the properties of the light division within the city limits of the City of Memphis if said properties were privately owned.

(5) For payment to a reasonable surplus account which may be used by the board of light, gas and water commissioners for extensions and improvements to the light plant or system and/or for the purchase of outstanding bonds that may have been issued for the benefit of the light division, as the board of light, gas and water commissioners may deem advisable.

(6) For payment to the general funds of the municipality a sum not to exceed a cumulative return of six per cent (6%) per annum of the equity or investment, if any, of the municipality in the properties of the light division, the said percentage to be fixed by resolution of the board of commissioners of the City of Memphis. Should the said percentage as fixed by the board of commissioners of the City of Memphis exceed a reasonable figure in the opinion of the board of light, gas and water commissioners, the amount to be paid by the board of light, gas and water commissioners to the board of commissioners of City of Memphis shall be determined by a board of arbitration consisting of one member of the board of city commissioners and one member of the board of light, gas and water commissioners, who shall

elect a third member, and the findings of this board of arbitration shall be final and binding on both the board of city commissioners and the board of light, gas and water commissioners.

Provided that in no event shall the aforesaid payment to the municipality for any year exceed one-half of the net profits realized by the light division during that year, unless the board of light, gas and water commissioners shall, by resolution, consent thereto.

(7) Any surplus then remaining, over and above safe operating margins, shall be devoted solely to rate reduction.

It is further provided that said allotment of funds may be changed in such manner as may be deemed necessary by the board of light, gas and water commissioners in contracting with the Tennessee Valley Authority for the purchase of power, or as may be deemed necessary by the board of commissioners of the City of Memphis, with the approval of the board of light, gas and water commissioners, in the issuance and sale of any bonds or notes on behalf of the electric system, or on behalf of the electric system in conjunction with the gas or water systems. (Priv. Acts 1939, ch. 381, § 19)

Sec. 692. Disposition of revenue of water division.

The revenue received each year from the operation of the water division, before being used for any other purpose, shall be used for the following purposes, in the order named, to-wit:

(1) For the payment of all operating expenses of the water division for the year.

(2) For interest accruals and sinking fund accruals on bonds or mortgages issued for the benefit of the water division.

(3) For cash payments to a working capital reserve, a renewals and replacement reserve, and a casualties reserve, for the benefit of the water division. Said cash payments to said reserves to be in such amounts as the light, gas and water commissioners think proper and by resolution elect to set up from time to time.

(4) For the payment to the general funds of the municipality a sum not to exceed a cumulative return of three per cent (3%) per annum of the equity or investment, if any, of the municipality in the properties of the water division, the said percentage to be fixed by resolution of the board of commissioners of the City of Memphis. Should the said percentages as fixed by the board of commissioners of the City of Memphis exceed a reasonable figure in the opinion of the board of light, gas and water commissioners, the amount to be paid by the board of light, gas and water commissioners to the board of commissioners of the City of Memphis shall be determined by a board of arbitration, consisting of one member of the board of city commissioners and one member of the board of light, gas and water commissioners, who shall select a third member, and the findings of this board of arbitration shall be final and binding on both the board of city commissioners and the board of light, gas and water commissioners.

(5) Any surplus thereafter remaining shall be retained by the board of light, gas and water commissioners and may be used by them for expansion and enlargement of the water division and/or purchase of bonds that may have been issued and outstanding for the benefit of said division.

(6) Any surplus thereafter remaining over and above safe operating margins, shall be devoted to rate reduction.

It is further provided that said allotment of funds may be changed in such manner as may be deemed necessary by the board of commissioners of the City of Memphis with the approval of the board of light, gas and water commissioners in the issuance and sale of any bonds or notes on behalf of the water system, or on behalf of the water system in conjunction with the gas or electric systems. (Priv. Acts 1939, ch. 381, § 20)

Sec. 693. Disposition of revenue of gas division.

The revenue received each year from the operation of the gas division, before being used for any other purpose, shall be used for the following purposes, in the order named, to-wit:

(1) For the payment of all operating expenses of the gas division for the year.

(2) For interest accruals and sinking fund accruals on bonds or mortgages issued for the benefit of the gas division.

(3) For cash payments to a working capital reserve, a renewals and replacements reserve, and a casualties reserve, for the benefit of the gas division. Said cash payments to said reserves to be in such amounts as the light, gas and water commissioners think proper and by resolution elect to set up from time to time.

(4) For payment to the general funds of the municipality a sum equal in amount to what would be the city taxes on the properties of the gas division within the city limits of the City of Memphis if said properties were privately owned.

(5) For payment to a reasonable surplus account which may be used by the board of light, gas and water commissioners for extensions and improvements to the gas plant or system and/or for the purpose of outstanding bonds that

may have been issued for the benefit of the gas division, as the board of light, gas and water commissioners may deem advisable.

(6) For the payment to the general fund of the municipality a sum not to exceed a cumulative return of six per cent (6%) per annum of the equity or investment, if any, of the municipality in the properties of the gas division, the said percentage to be fixed by resolution of the board of commissioners of the City of Memphis. Should the said percentage as fixed by the board of commissioners of the City of Memphis exceed a reasonable figure in the opinion of the board of light, gas and water commissioners, the amount to be paid by the board of light, gas and water commissioners to the board of commissioners of the City of Memphis shall be determined by a board of arbitration, consisting of one member of the board of city commissioners and one member of the board of light, gas and water commissioners who shall select a third member, and the findings of this board of arbitration shall be final and binding on both the board of city commissioners and the board of light, gas and water commissioners.

Provided that in no event shall the aforesaid payment to the municipality for any year exceed one-half of the net profits realized by the gas division during that year, unless the board of light, gas and water commissioners shall, by resolution, consent thereto.

(7) Any surplus thereafter remaining over and above safe operating margins, shall be devoted solely to rate reduction.

It is further provided that said allotment of funds may be changed in such manner as may be deemed necessary by the board of commissioners of the City of Memphis, with the approval of the board of light, gas and water commissioners, in the issuance and sale of any bonds or notes on behalf of the gas system, or on behalf of the gas system in conjunction with the electric or water systems. (Priv. Acts 1939, ch. 381, § 22; Priv. Acts 1945, ch. 18, § 1; Priv. Act 1947, ch. 491, § 1; Priv. Acts 1959, ch. 224, § 1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-39

Supreme Court, U. S.
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JUL 8 1977
MICHAEL RODAK, JR., CLERK

MEMPHIS LIGHT, GAS AND WATER DIVISION, *et. al.*,
Petitioners,

v.

WILLIE S. CRAFT and MARY CRAFT,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE

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v.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Tennessee Code Annotated and the Memphis Code of Ordinances, which were not included in Petitioners' Brief are set forth in Appendix B, attached hereto.

QUESTIONS PRESENTED

1. Whether water, gas and electricity service which a municipally owned utility company has a legal duty under state law to provide is a property interest protected by the Due Process Clause of the Fourteenth Amendment?

2. Whether a procedure for termination of water, gas and electricity service which provides neither notice of the opportunity to be heard nor any opportunity to be heard is consistent with the Due Process Clause of the Fourteenth Amendment?

SUPPLEMENT TO PETITIONERS' STATEMENT OF THE CASE

This action was brought by five plaintiffs [1] under the Civil Rights Act, 42 U.S.C. Section 1983, seeking damages, declaratory and injunctive relief against a municipal utility, alleging that their water, gas and electricity service had been terminated without due process of law as required by the Fourteenth Amendment to the United States Constitution. [2] (A.3-18).

The District Court found that the Memphis Light, Gas and Water Division and the other defendants [3] (hereinafter referred to collectively as MLG&W) had not violated the plaintiffs' due process rights and dismissed the action. (Opinion and Order

[1] The suit was filed as a class action pursuant to Fed. R. Civ. P. 23(b)(2). The District Court refused to certify the cause as a class action (App. B to Petition for Certiorari, 42), and this holding was affirmed by the Court of Appeals. *Craft v. Memphis Light, Gas and Water Division*, 534 F.2d 684, 686 (6th Cir. 1976).

[2] Plaintiffs also challenged the right of Memphis Light, Gas and Water Division to refuse to initiate service to a person because of an outstanding bill owed by another person at the address where service is sought. Plaintiffs were ultimately successful in this claim, *Craft v. Memphis Light, Gas and Water Division, supra*, 534 F.2d at 689-90, and no review of this part of the Court of Appeals decision was sought.

[3] The individual defendants are Calvin Henze, President of Memphis Light, Gas and Water Division; Henry J. Winkelman, Vice-President; Eliot Whittington, Commissioner; Robert S. Bowers, Commissioner; Patricia Shaw, Commissioner. Clyde Brown and C.R. Tennen, employees of M.L.G.&W. who effected the termination of utility service to the plaintiffs on one or more occasions, were made defendants in the Amended Complaint filed August 29, 1974.

attached to Petition for Certiorari as App. B, 33-49.) However, the District Court did suggest certain changes in the termination procedure of MLG&W "to improve the procedure used in terminating utility services for non-payment and with respect to negotiating disputes and difficulties about the outstanding amount of bills." (App. B to Petition for Certiorari, 48).

The Court of Appeals reversed the decision of the District Court in so far as it held that the Crafts had been afforded due process and remanded the case to determine the specific process due. *Craft v. Memphis Light, Gas & Water Division*, 534 F.2d 684 (6th Cir. 1974). The Court of Appeals affirmed that portion of the District Court decision which held no due process violation as to Sarah Parks but reversed the lower court finding of no equal protection violation as to Ida Bell Holmes. Since no review was sought in this Court concerning that portion of the decision concerning Holmes and Parks, only the holding of the Court of Appeals concerning Mr. and Mrs. Willie S. Craft is presently before the Court. [4]

Mr. and Mrs. Willie S. Craft, homeowners in Memphis, had their water and other utility services cut off five times by MLG&W between June, 1973 and the filing of this suit in February 1974. (App. B to Petition for Certiorari, 38). The first time, when only their water service was terminated, Mrs. Craft took a day off work and went to the main office of MLG&W, where she stayed the entire day attempting to ascertain the reason for the termination. Because the matter was not resolved the first day, Mrs. Craft returned the following morning in a further attempt to have her water service restored. The matter again was not resolved, and the Craft family was without water service for a week before service was restored. (A.86-87).

Shortly after the water problem was resolved, the Crafts began to receive two computer billings each month from MLG&W,

[4] One of the original plaintiffs, Annie Sue Funzie, did not participate in the trial or the appeal below because, by stipulation of counsel for both parties, her utilities had been terminated for failure to pay a correct and undisputed utility bill.

each containing charges for gas and electricity service. (A.89, 33-35). One computer bill was in the name of Willie *S.* Craft and the other in the name of Willie *C.* Craft. Over a period of several months, all the Crafts' utility services were terminated at least four times. The employee of MLG&W effecting the terminations did not personally contact the Crafts or any other person in the home prior to making the terminations. (App. B to Petition for Certiorari, 38). When service was terminated, Mrs. Craft visited the office of MLG&W to learn the reason for the double computer billings and the terminations of service. Each time she was unsuccessful. On at least three of these visits, Mrs. Craft took off time from work and spent the entire day in MLG&W's offices. (App. B to Petition for Certiorari, 38; A.93).

The District Court specifically found that "all during the time of these disputes, Mr. and Mrs. Craft made good faith efforts to pay for their utilities as well as to straighten out their problems." (App. B to Petition for Certiorari, 39). Despite this, the Crafts were met with hostility from MLG&W employees. For example, on one occasion Mrs. Craft called MLG&W's offices to explain that she had paid the bill that MLG&W claimed was still outstanding, but an MLG&W employee told her she must "pay it again" to avert the threatened termination. (A.103-4). On another occasion, Mrs. Craft was cursed by an MLG&W employee. *Id.* MLG&W's employees also refused to identify themselves or disclose to Mrs. Craft the names of any supervisors to contact. (A.97).

The Crafts finally were told by MLG&W that the reason for the double computer billing each month was that they had two gas meters and two electric meters at their house. Although the Crafts were aware of the two meters, they thought one set was closed off. At the suggestion of MLG&W, the Crafts then paid $152.20 to have one set of meters removed. Nevertheless, the Crafts continued to receive double computer billings for two months after the extra meters were removed. (A.94; App. B to Petition for Certiorari, 38).

Not until after this action was filed were the Crafts able to discover that they continued to receive double computer billings because MLG&W failed to combine the two accounts properly, (A.146-150), or that, as a result of the double computer billings, MLG&W had overcharged them for gas service and city service fees.[5] (A.171).

When MLG&W's computer determines that payment is not received for utility service, the computer sends a form notice to the customer, stating that service will be disconnected if the amount listed as due is not paid by 5:00 P.M. on the date listed. (Def. Ex. 7; A.42, 136). With the notice is one of two "flyers".[6] The first, sent to 40% of MLG&W's customers given final notice, informs customers solely of the availability of community credit counseling procedures to help a customer "having difficulty paying" the bill. It does not inform the customer of any steps to take to resolve a disputed bill. The second flyer, sent only to areas not accommodated by community credit counseling stations, possibly mentions that the customer may bring the bill to an MLG&W office if there is a dispute. *Craft v. MLG&W, supra*, 534 F.2d at 688 n.4.[7] The Court of Appeals refused to find that the Crafts were sent this second flyer.[8] *Id.*

Memphis Light, Gas & Water Division, a municipal utility, has "no established procedure for resolution of disputes" with its customers, *Id.* at 689, either before or after the termination of service. Nor has MLG&W any written policies concerning resolution of disputes. Furthermore, no agency provides any

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[5] The city service fee is a separate item on the regular utility bill as specified by the City of Memphis Code, Section 19-14.

[6] *See Craft v. MLG&W, supra*, 534 F.2d at 688 n.4.

[7] Although MLG&W's witness quoted one of their "flyers" as giving information concerning resolution of disputes (A.137), the flyers that he introduced into evidence contained no language about dispute resolution. (Def. Ex. 9(a) and 9(b); A.45, 137).

[8] MLG&W failed to introduce evidence at trial to show whether the Craft's resided in a geographic area not served by community credit counseling stations. Mrs. Craft testified at trial that she did not receive the second flyer, or any other notice of termination. (A.102-3).

complaint resolution procedures for disputes with MLG&W. The Tennessee Public Service Commission has no jurisdiction over municipal utilities. Tenn. Code Ann. §6-1306, 1317.

A customer who has a dispute with MLG&W may seek to resolve the matter by complaining to MLG&W's employees, as did Mrs. Craft. But this is left entirely to the initiative of the customer, and there is no established procedure to be followed. (A.162-3). The only way a customer even would know with whom to talk is by word of mouth referral. (A.163). As the Court of Appeals noted, the Secretary-Treasurer of MLG&W at first refused to acknowledge at the trial that any customer could have a bona fide dispute, although later in the trial he acknowledged there could be customer disputes in extremely limited circumstances. *Craft v. MLG&W, supra*, 534 F.2d at 689 & n.7; (Tr.226-9) (A.164).

Although MLG&W does have a well defined extended payment plan for those having difficulty paying an admitted liability, this "provides no avenue for customers who . . . dispute the existence of the liability." *Craft v. MLG&W, supra*, 534 F.2d at 689.

SUMMARY OF ARGUMENT

Water, gas and electricity service from a municipally owned utility is a property interest protected by the Due Process Clause of the Fourteenth Amendment. Protected property interests include a "variety of interests which are difficult of definition", *Paul v. Davis*, 424 U.S. 693, 710 (1976), and they are defined and determined by any of several sources, including state law. *Goss v. Lopez*, 419 U.S. 565 (1975).

Tennessee common law establishes that the Crafts have a property interest in the continued receipt of water and other vital utility services. Customers of a utility have a "legal right" under Tennessee law to continued service and the utility has a "legal duty" to supply it. *Crumley v. Watauga Water Co.*, 99 Tenn. 420, 41 S.W. 1058 (1897); *Farmer v. Nashville*, 127 Tenn.

509, 156 S.W. 189 (1912). Although a recipient of utility service may be required to comply with reasonable regulations of a public utility, including payment of a justly imposed bill, a customer's service cannot be terminated lawfully where a bona fide dispute exists. *Trigg v. Middle Tennessee Electric Membership Corp.*, 533 S.W.2d 730 (Tenn. App. 1975), *cert. den.*, March 15, 1976.

Since the Crafts have a property interest in the continued receipt of water, gas and electricity, "the question remains, what process is due". *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). MLG&W's termination procedures lack even the minimum due process requirements of notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Wolff v. McDonnell*, 418 U.S. 539, 557-8 (1974). The notice form used by MLG&W is not reasonably calculated to inform the consumer of any method for disputing a contested bill, nor does MLG&W or any agency provide any hearing procedure for the resolution of disputes either before or after termination of service.

Determination of the specific requirements of due process requires analysis of the various interests at stake. *Mathews v. Eldridge*, 424 U.S. 319 (1976). The severity of deprivation of water and other services, the great risk of erroneous deprivation, and MLG&W's minimal interest in prompt payment and minimal administrative burden require MLG&W to provide timely notice adequately informing the customer of the reasons for the termination and the steps to take to resolve a dispute concerning the bill and to provide a hearing prior to termination. *Palmer v. Columbia Gas Co.*, 479 F.2d 153 (6th Cir. 1973). The hearing should include the right to present information and rebut the records presented to support the proposed termination, the right to an impartial decision maker and a written decision. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

ARGUMENT

I.

RESPONDENTS HAVE A PROTECTED PROPERTY INTEREST IN THE RECEIPT OF WATER, GAS AND ELECTRICITY SERVICE FROM PETITIONERS.

This Court consistently has held that property interests protected by the Due Process Clause of the Fourteenth Amendment from arbitrary governmental deprivation [9] consist of more than the "actual ownership of real estate, chattels or money", *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972), and include a "variety of interests which are difficult of definition." *Paul v. Davis*, 424 U.S. 693, 710 (1976). *See Dixon v. Love*, ___ U.S. ___ , 45 U.S.L.W. 4447 (1977) and *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license); *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Goss v. Lopez*, 419 U.S. 566 (1975) (public school education); *North Georgia Finishing Co. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (possessory interest in chattel goods); *Perry v. Sindermann*, 408 U.S. 593 (1972) (contract of employment at state university); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (right to purchase liquor).

To determine whether an interest is protected by the Due Process Clause, the Court has directed the inquiry to various possible sources of protection, such as specific guarantees of the Bill of Rights incorporated into the Fourteenth Amendment, *see Monroe v. Pape*, 365 U.S. 167 (1961) (unreasonable search and seizure violative of the Fourteenth Amendment); *Paul v. Davis*,

[9] Since MLG&W is municipally owned and operated (App. B to Petition for Certiorari, 38), its conduct of terminating the Crafts' utilities constitutes state action or action under color of state law. *Avery v. Midland County*, 390 U.S. 474, 479-80 (1968). Thus, this case raises the issues specifically reserved by the Court in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 359 (1974).

424 U.S. 693, 710 n.5 (1976); or the "core values" of liberty, *see Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (interest in continued parole); or those rights " 'fundamental' or 'implicit in the concept of ordered liberty.' " *Roe v. Wade*, 410 U.S. 113, 152 (1973) (woman's decision to terminate pregnancy); *see Boddie v. Connecticut*, 401 U.S. 371, 374-7 (1971) (indigent's right of access to courts to dissolve marriage).

This Court also has held that state law can be a source of protected interests. For example, in *Goss v. Lopez, supra*, 419 U.S. at 572-3, the Court, finding a protected property interest in public school attendance, stated, "Protected interests in property are normally 'not created by the Constitution. Rather they are created and their dimensions defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." The specific aspect of state law creating the protected interest may be a statute or regulation, *see Goss v. Lopez, supra* (right to attend public school); an ordinance, *cf. Bishop v. Wood*, 426 U.S. 341 (1976) (public employment); a contract, express or implied, *see Perry v. Sindermann, supra* (employment at state university); a policy or practice, *see Perry v. Sindermann, supra*, 408 U.S. at 603; or the state common law, *see North Georgia Finishing Co. v. Di-Chem, Inc., supra*; *Boddie v. Connecticut, supra*, 401 U.S. at 375. Thus, a right or status recognized by state law is subject to the protection of the Due Process Clause. *Paul v. Davis, supra*, 424 U.S. at 711.

The state law need not explicitly grant the specific protected interest as long as it creates a reasonable expectation, or "legitimate claim of entitlement", to the property or liberty. *See Perry v. Sindermann, supra* (implied contract); *Morrissey v. Brewer, supra*, 408 U.S. at 479 (parolee's continued entitlement to liberty "implicit" in parole system); *see also Bell v. Burson, supra* (no express right to continued enjoyment of a driver's license); *Wisconsin v. Constantineau, supra* (property interest exists in purchasing liquor absent express authority); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) (no express right to practice law); *Dent v. West Virginia*, 129 U.S.

114 (1889) (no express right to practice medicine). That the expectation or entitlement is a "privilege" rather than a "right" is not relevant. *E.g., Elrod v. Burns*, 427 U.S. 347, 361 (1976); *see generally* Van Alstyne, *Cracks in "The New Property"*, 62 Cornell Law Rev. 445, 445-8 (1977).

Similarly, that the entitlement is not unconditional has uniformly been assumed to be no bar to protected status where the person's interest is more than a unilateral expectation or abstract need or desire. *See, e.g., Mathews v. Eldridge, supra* and *Goldberg v. Kelly, supra* (no right to welfare benefits absent eligibility); *Goss v. Lopez, supra* (no right to continuous free public education if less than 6 years old, more than 21 years old, or where misconduct exists); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (no right to good time credits where there is flagrant or serious misconduct); *Bell v. Burson, supra* (no right to driver's license if under age, if unable to pass driver's test, or if uninsured and unable to post security after involvement in accident); *Connell v. Higgenbotham*, 403 U.S. 207 (1971) (no right to continued public employment where misconduct exists); *Wisconsin v. Constantineau, supra* (no right to purchase liquor if under age or if dangerous to peace of community); *Schware v. Board of Bar Examiners, supra* (no right to practice law if bad moral character or lacking in proficiency in the law). *See also* Monagham, *Of Liberty and Property*, 62 Cornell L. Rev. 405, 440-41 (1977).

Tennessee common law creates in the Crafts "a legitimate claim of entitlement" to continued receipt of water, gas and electricity service from MLG&W. *See Farmer v. Nashville*, 127 Tenn. 509, 156 S.W. 189 (1912); *Crumley v. Watauga Water Co.*, 99 Tenn. 420, 41 S.W. 1058 (1897); *Trigg v. Middle Tennessee Electric Membership Corp.*, 533 S.W.2d 730, 733 (Tenn. App. 1975), *cert. den.*, March 15, 1976.

The Tennessee Supreme Court held in *Crumley* that customers of the water company had a "present legal right" to water service. 99 Tenn. at 427. The water company had accepted Crumley's note for his past due obligation for water previously furnished. After a short period of not taking the

company's water, Crumley requested resumption of water service and tendered the regular rates. The water company refused to provide service until Crumley actually paid in full his past due bill. The Tennessee Supreme Court held that the company had breached its legal duty toward Crumley by refusing to provide water since it already had accepted his credit for past indebtedness. *Id.* at 423. As the Court reasoned:

> There are exceptions to the general rule that a person engaged in business may, at his election, and without good reason, refuse to deal with some other person. These exceptions embrace . . . gas companies, electric light companies, and water companies, and are based upon the public nature of the business done by such persons. Being engaged in public business under public grants, they are charged with public duties.

Id. at 422-3.

Similarly, in *Farmer v. Nashville, supra*, a tenant brought suit against the City of Nashville because of the latter's refusal to provide water service to his home. The city had terminated service based on a previous tenant's unpaid bill charged to the owner. The city maintained that its by-law permitted termination for non-payment of the water bill by the property owner to whom the service was provided. The Tennessee Supreme Court, however, finding for the tenant, held that the city utility was "charged with the public duty of furnishing water to all the inhabitants of the city," 127 Tenn. at 515, and that its by-law was "unjust, unreasonable, and unauthorized by...[its] charter, and is therefore void." *Id.* at 518. *Accord, Watauga Water Co. v. Wolfe*, 99 Tenn. 428, 430-31, 41 S.W. 1060, 1061 (1897); *Trigg v. Middle Tennessee Electric Membership Corp., supra*, 533 S.W.2d at 733.

Furthermore, Tennessee law provides that a utility, having extended service to an area, has no right to withdraw service from customers in that area on the ground that it had no obligation to provide service in the first instance. *Chandler Inv. Co. v. Whitehaven Utility Dist. of Shelby County*, 44 Tenn. App. 1, 21, 311 S.W.2d 603, 612 (1957), *cert. den.*, March 4,

1958. Thus, since utility service has been extended by MLG&W, the Crafts have a legitimate claim of entitlement to the service and it cannot be revoked arbitrarily.

MLG&W relies on *Patterson v. City of Chattanooga*, 192 Tenn. 267, 241 S.W.2d 291 (1951) to contend that it has no legal duty to continue service to customers who do not pay the full charges MLG&W claims is due. Petitioners' Brief at 25. They thus assert an unrestricted right to terminate service during a dispute over a bill even where the customer makes good faith efforts to both resolve the dispute and pay the undisputed portion of the bill. *Id.* at 29-31.

But *Patterson* does not support this contention. It held only, and quite properly, that utility customers have no property right in continued utility service where there is an undisputed non-payment of a proper bill and the utility has adopted reasonable regulations permitting termination in such circumstances. *Patterson v. City of Chattanooga, supra*, 192 Tenn. at 276, 241 S.W.2d at 296. This holding is entirely consistent with *Farmer, Crumley* and *Trigg*. Indeed, the Court in *Patterson* cites *Farmer* with approval, *Id.*, and does not purport in any way to overrule its seminal decision in *Crumley*.

As in *Farmer, Crumley* and unlike *Patterson*, this case does not involve non-payment of an undisputed proper bill. The Crafts' water and other services were terminated because of a bona fide, indeed valid, dispute and despite the Crafts' good faith efforts to resolve the dispute promptly. It is the common law of Tennessee, as in other jurisdictions without exception, [10] that it is unreasonable and unlawful for a utility to terminate service where a bona fide dispute exists.

[10] *See, e.g., Mobile Electric Co. v. Nelson*, 209 Ala. 554, 96 So. 713 (1923); *Steele v. Clinton Electric Light & Power Co.*, 123 Conn. 180, 193 A. 613 (1937); *Winchester v. Kentucky Utilities Co.*, 182 Ky. 144, 206 S.W. 296 (1929); *Mississippi Power Co. v. Cochran*, 167 Miss. 705, 147 So. 473 (1933); *Randolph v. St. Joseph Gas Co.*, 250 S.W. 642 (Mo. App. 1923); *Miller v. Roswell Gas & Electric Co.*, 22 N.M. 594, 166 P. 1177 (1917); *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933); *Southwestern Gas & Electric Co. v. Stanley*, 123 Tex. 157, 70 S.W.2d 413 (1934); Annot., 112 A.L.R. 237 (1938).

> A company supplying electricity to the public has the right to cut off service to a customer for nonpayment of a just service bill and the company may adopt a rule to that effect. Annot. 112 A.L.R. 237 (1938). An exception to the general rule exists when the customer has a bona fide dispute concerning the correctness of the bill. *Steele v. Clinton Electric Light & Power Co.*, 123 Conn. 180, 193 A. 613, 615 (1937); Annot., 112 A.L.R. 237, 241 (1938); *see* also 43 Am.Jur., Public Utilities and Services, Sec. 65; Annot., 28 A.L.R. 475 (1924).

Trigg v. Middle Tenn. Electric Membership Corp., supra, 533 S.W.2d at 733.

Because of the utility's natural monopoly and public duty, the utility is so constrained even if it adopts a rule or regulation permitting termination despite the dispute:

> We are aware that defendant's rules and regulations, which plaintiffs agreed to obey, require payment whether or not a bill is received by a customer. In our view however, this rule does not resolve the conflict that arises when a customer, who is willing to and does pay a certain portion of the bill, disputes the amount due. ***A public utility should not be able to coerce a customer to pay a disputed bill.*** (emphasis added)

Id. See also Crumley v. Watauga Water Co., supra, 99 Tenn. at 427. Like the utility in *Trigg*, MLG&W's regulation permitting termination of service for non-payment does not "resolve the conflict" in favor of MLG&W where there is a bona fide dispute. Thus, under Tennessee law MLG&W is under a "legal duty" to provide, and the Crafts have a "legal right" to receive, water and other services. *Farmer v. Nashville, supra*; *Crumley v. Watauga Water Co.*, supra.

The common law right to utility service particularly requires due process protection because of the extent of the deprivation involved. Whether the interest is protected from arbitrary deprivation by the Due Process Clause depends generally on its "nature" rather than "weight", *Board of Regents v. Roth, supra*, 408 U.S. at 571, but the extent of deprivation also may be relevant. *See Morrissey v. Brewer, supra*, 408 U.S. at 481

("grievous loss" of parole revocation); *cf. Meachum v. Fano*, 427 U.S. 215, 235 (1976) (Stevens, J., dissenting) ("grievous loss"); *Goss v. Lopez, supra*, 419 U.S. at 742-3 (Powell, J., dissenting) ("serious or significant infringement").

Deprivation of water is deprivation of "an absolute necessity of life". *Davis v. Weir*, 328 F. Supp. 317, 321 (N.D. Ga. 1971), *aff'd*, 497 F.2d 139 (5th Cir. 1974). Particularly in urban areas, such as where the Crafts reside in Memphis, water from the utility is "indispensible to life and health". *Koger v. Guarino*, 412 F. Supp. 1375, 1388 (E.D. Pa. 1976), *aff'd on opinion below*, ____ F.2d ____ (3rd Cir. 1977); *see also Lamb v. Hamblin*, 57 F.R.D. 58, 60 (D. Minn. 1972) and discussion at 18, *infra*. There are no alternatives in urban areas, as in rural regions, of streams or lakes. [11] Thus customers of MLG&W, like the Crafts, are entirely dependent on the utility for life-sustaining water. Termination of gas and electricity service in conjunction with water termination may be even more grievous, particularly in winter, when death by freezing can occur quickly. *See Stanford v. Gas Service Co.*, 346 F. Supp. 717 (D. Kan. 1972), and discussion at p. 19, *infra*.

In sum, the Crafts' legal right under Tennessee law to receive water, gas and electricity from MLG&W is a property interest protected by the Due Process Clause of the Fourteenth Amendment. *Wolff v. McDonnell, supra*; *Morrissey v. Brewer, supra*; *Perry v. Sindermann, supra*; *Bell v. Burson, supra*.

[11] While the digging of a well is not prohibited outright in Memphis, it is subject to extensive regulations and procedures making it entirely infeasible for an individual urban homeowner. *See* City of Memphis *Code* §32-102 et. seq.

II.

RESPONDENTS ARE ENTITLED TO ADEQUATE NOTICE AND HEARING PRIOR TO BEING DEPRIVED OF THEIR PROTECTED INTEREST IN WATER, GAS AND ELECTRICITY SERVICE.

Since the Crafts possess a protected property interest in continued water, gas and electricity service, their utility service cannot be terminated by MLG&W without due process of law. *See, Mathews v. Eldridge, supra*; *Wolff v. McDonnell, supra*; *North Georgia Finishing Co. v. Di-Chem, Inc., supra*; *Perry v. Sindermann, supra*. However, "the question remains what process is due". *Morrissey v. Brewer, supra*, 408 U.S. at 481.

Although "[d]ue process is perhaps the least frozen concept in our law," *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1955) (Frankfurter, J., concurring), this Court consistently has held that adequate process encompasses at a minimum the right to notice and an opportunity to be heard, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1960), and that these rights "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

A. MLG&W's Notice Is Not Reasonably Calculated To Inform A Customer Of The Method For Disputing A Bill.

The notice used by MLG&W is constitutionally defective because it fails to adequately inform customers how they can dispute a bill. This Court has said:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afforded them an opportunity to present their objections.

Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. at 314.

The computer notice sent to the Crafts was not reasonably calculated to inform them of how to present their objection. Designed solely to aid those unable to pay their bill, the notice fails to mention any possible procedures for dispute resolution. [12] Accompanying the notice is one of two flyers. The first flyer, sent to 40% of all customers sent final notice, also fails to mention any procedures for dispute resolution. The second flyer, sent to customers in only some areas, may refer to a procedure for resolving a dispute, [13] but the Court of Appeals refused to find that the Crafts were sent this flyer. *Craft v. Memphis Light, Gas & Water Division, supra,* 534 F.2d at 688 n.4. As the Court of Appeals found in summing up the inadequacies of MLG&W's notice procedure:

> Constitutionally sufficient 'shut-off notice . . . [must] provide the customer with the information he needs to quickly and intelligently take available steps to prevent the threatened termination of service.' [*Palmer v. Columbia Gas,* 479 F.2d 153, 166 (6th Cir. 1973)]. Yet the MLG&W "final notice" no better informs customers, like the Crafts, who dispute the underlying liability than the constitutionally deficient notice in *Palmer.* Like the Columbia Gas notice therein, the MLG&W notice fails to mention "that a dispute concerning the amount due might be resolved through discussion with representatives of the company." Nor did the notice, at least prior to the opinion of the district court, inform the customer that "[c]redit [c]ounselors are available to clear up any questions, [to] discuss disputed bills or to make any needed adjustments." [Citation and footnote omitted.] Like the Columbia Gas notice, the MLG&W notice only warns the customer to pay or face termination. *See Davis v. Weir,* 359 F. Supp. 1023, 1026 (N.D.Ga. 1973); *Bronson, supra,* 350 F. Supp. at 450.

Id., at 687-89.

[12]MLG&W changed its notice in response to a suggestion by the District Court. However, the amended notice fails to make any reference to procedures for resolving a dispute. *See Craft v. MLG&W, supra,* 534 F.2d at 688 n.5.

[13]See footnote 7, *supra.*

The procedures followed by MLG&W's service personnel actually effecting the termination are also completely inadequate for customers with disputed bills. MLG&W's witness testified that service personnel are instructed to "attempt" a personal contact prior to termination by knocking on the customer's door. (A. 112). But as the District Court found, the Crafts never received such personal notice, (App. B. to Petition for Certiorari, 38), and in fact such attempts are unsuccessful nearly one half the time. (A. 191). Even if personal contact were made, service personnel are authorized to postpone the termination only if there is an illness in the family or if the customer states that full payment is in the mail. (A. 112). They have no authority to postpone where a customer, like the Crafts, contests a bill. *Craft v. MLG&W, supra,* 534 F.2d at 689.

In sum, MLG&W relies on three inadequate procedures to satisfy the notice requirement of due process: (1) a final notice that contains no indication of how a miscalculated bill might be questioned, challenged and corrected; (2) a reference to a procedure for dispute resolution contained in a "flyer" sent to customers in only some geographic areas but not sent to the Crafts; and (3) the possibility of personal contact by service personnel who cannot postpone termination for persons, like the Crafts, disputing a bill.

While these procedures may be adequate constitutionally for those unable to pay their bill, that issue is not before this Court. The issue here is whether the notice was reasonably calculated to inform the Crafts of the procedures for disputing a bill. The procedures are wholly inadequate for this purpose.

B. The Complete Lack of Hearing Procedures For The Resolution of Disputes Violates Due Process

The procedural due process decisions of this Court have "consistently held that some kind of hearing is required at some time *before* a person is finally deprived of his property interests." *Wolff v. McDonnell, supra,* 418 U.S. at 557-558 (emphasis

added). *E.g., Smith v. Organization of Foster Families,* —— U.S.——, 45 U.S.L.W. 4638, 4646 (June 13, 1977); *Mathews v. Eldridge, supra,* 424 U.S. at 333; *North Georgia Finishing Co. v. Di-Chem, Inc., supra,* 419 U.S. at 606; *Goss v. Lopez, supra,* 419 U.S. at 578; *Board of Regents v. Roth, supra,* 408 U.S. at 568-70; *Bell v. Burson, supra,* 402 U.S. at 542; *Wisconsin v. Constantineau, supra,* 400 U.S. at 437.

Neither MLG&W nor any administrative agency has any hearing procedures for the resolution of customer disputes, either before or after termination. In fact, MLG&W's Secretary-Treasurer was reluctant to admit that a customer could ever have a bona fide dispute. *Craft v. MLG&W, supra,* 534 F.2d at 689 & n.7. The Crafts were terminated on a least five separate occasions. Yet, they were forced to bring this action to ascertain the reasons for termination. Mary Craft lost at least five full days from work to go to MLG&W's office in a vain effort to learn why her family was left without water and other services. (A. 93).

This is not a case where extensive procedures are provided but the time or sufficiency of the hearing procedures is in issue. *Compare with Smith v. Organization of Foster Families, supra,* 45 U.S.L.W. at 4639-42 (extensive statutory procedures); *Dixon v. Love, supra,* 45 U.S.L.W. at 4448-49 (full post-deprivation hearing on license suspension plus full judicial hearing on each conviction); *Mathews v. Eldridge, supra,* 424 U.S. at 335-40 ("elaborate" post-termination proceedings).

Rather this case involves a complete lack of hearing procedures for resolving disputes. This case, therefore, is similar to other decisions of this Court where the absence of any hearing procedure was found to be violative of procedural due process. *See, e.g., Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 149 (1951) (Frankfurter, J., concurring) and cases cited therein; *Perry v. Sindermann, supra*; *Morrissey v. Brewer, supra.*

MLG&W cites its procedure for arranging extended payment as proof of adequate hearing procedures. The extended payment plan, however, is not meaningful to customers, like the Crafts, who are ready and willing to pay what they actually owe, but dispute the amount of the bills. As the Court of Appeals found, the

extended payment plan "provides no avenue for customers who . . . dispute the existence of the liability." *Craft v. MLG&W, supra,* 534 F.2d at 689.

C. Analysis of the Competing Interests Requires a Meaningful Hearing Prior to Termination of Service.

Recently, this Court has articulated a standard for considering the pertinent interests to determine the type and nature of a hearing required by due process. In *Mathews v. Eldridge,* the Court stated:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 334-5; *see Smith v. Organization of Foster Families for Equality and Reform, supra,* 45 U.S.L.W. at 4646; *Dixon v. Love, supra,* 45 U.S.L.W. at 4449; *Ingraham v. Wright,* —— U.S. ——, 97 S. Ct. 1401, 1414-15 (1977); *see also Goss v. Lopez, supra,* 419 U.S. at 579.

Analysis of these three factors shows that the Crafts have suffered a grievous deprivation; the risk of erroneous deprivation is substantial; and MLG&W and the City of Memphis will suffer little harm and actually may benefit from imposition of hearing requirements.

1. Deprivation of Water, Gas and Electricity Service is Severe.

Water is an absolute necessity of life. *Koger v. Guarino, supra*; *Davis v. Weir, supra*. It is necessary for nourishment, personal hygiene and sewage disposal. A home without access to water is unfit for human habitation. *See* City of Memphis Code §51-111 et. seq. The absence of water can cause disease and death and is a clear public safety hazard. As one district court observed: "Termination of water service inflicts hardships on the consumer that transcend the deprivation of other protected interests". *Lamb v. Hamblin, supra,* 57 F.R.D. at 61.

While water is unique for human life, the loss of electricity and gas also can threaten life, health and safety. Early found to be a "indispensible necessity of life," *Jones v. Portland,* 245 U.S. 217, 223 (1917), electricity runs oil and coal burners, refrigerates food, and lights homes. Termination of electricity can shut off home life support systems. [14] Elderly people have died when their furnaces could not function for lack of electricity. *See, e.g., Grand Jury Report Pursuant to Section 190.85 of the Criminal Procedure Law of the State of New York* (Schenectedy Cty., N.Y. June 21, 1974).

Gas similarly is used for heat in many homes, and its absence can be threatening to life. As one court noted in comparing loss of gas with loss of welfare benefits: "A person can freeze to death or die of pneumonia much more quickly than he can starve to death." *Palmer v. Columbia Gas Co.*, 342 F. Supp. 241, 244 (N.D.Ohio 1972), *aff'd,* 479 F.2d 153 (6th Cir. 1973). *See also Stanford v. Gas Service Co., supra,* 346 F. Supp. at 719-20 (gas for heating is "necessary to sustain life"); *Re Transcontinental Gas Pipeline,* 16 P.U.R.4th 423, 451 (F.P.C. 1976) (mandatory cessation of

[14] A case documented in the Massachusetts Department of Public Utilities involves a child whose life depended on an electric breathing system. Her mother allegedly owed an electric bill. With knowledge of the situation, the company attempted termination. Fortunately for the child, termination mistakenly was effected of her aunt's electric service. *Re Mary Silva* (Mass. D.P.U. Oct. 1976).

gas service held unacceptable because of "potential dangers . . . of human suffering").

Thus, the cumulative consequences of water, gas and electricity termination are potentially catastrophic, depriving the customer of "the very means by which to live." *Goldberg v. Kelly, supra,* 397 U.S. at 264. It constitutes a deprivation far more serious and immediate than the loss of welfare benefits, *Id.*; wages, *Sniadach v. Family Finance Co.*, 395 U.S. 337 (1969); driver's license, *Bell v. Burson, supra*; possession of personal property, *North Georgia Finishing Co. v. Di-Chem, Inc., supra*; and the monetary loss resulting from paying higher wages, *Opp Cotton Mills v. Administrator,* 312 U.S. 126 (1940), all of which require substantial procedural protections.

The power to terminate water and other vital services is the power to coerce. *See Crumley v. Watauga Water Co., supra,* 99 Tenn. at 427, 41 S.W. at 1060; *Trigg v. Middle Tenn. Electric Membership Corp., supra,* 533 S.W.2d at 733. Procedural protections for Memphis residents, like the Crafts, are essential to shield them from the severe consequences of arbitrary government termination of vital services.

2. The Risk Of Erroneous Deprivation Is Substantial And Procedural Safeguards Will Avoid Unwarranted Injury.

In large governmental entities like MLG&W, the problem of computer and human error is significant. MLG&W, involved in multitudinous transactions with the public, bills hundreds of thousands of customers monthly by computer. (A. 73). Computer transactions now affect the individual in most aspects of daily life. *See, e.g.,* Senate Committee on Government Operations, *Staff Study on Computer Security in Federal Programs,* 95th Cong., 1st Sess. 5-6 (1977) (computers used pervasively in government); *Electronic Funds Transfer Systems: A Symposium,* 25 Cath. U.L. Rev. 687 (1976) (financial matters); *Medical Data Privacy: Automated Interference With Contractual Relations,* 25 Buff. L. Rev. 491 (1976) (medical profession); *Law and Technology*

Symposium, 52 Chi-Kent L. Rev. 545 (1976) (legal profession); *see generally Index and Tenth Selected Bibliography On Computers and the Law,* 5 Rutg. J. Computers & Law 505 (1976). While computers clearly benefit all by magnifying capabilities, they also magnify mistakes. "Computer error" is fearsome and has prompted considerable response, including comprehensive legislation, *see* Fair Credit Billing Act, 15 U.S.C. §§1661, et seq., and a voluminous report by a national commission. *See* National Commission on Electronic Fund Transfers, *EFT and the Public Interest* (1977). The legislative history to the Fair Credit Billing Act, describing the dangers of computer error, cites a Minneapolis study that found that one of three Minneapolis residents had been subjected to "computer error". S. Rep. No. 93-278, 93d Cong., 1st Sess. 5 (1973). A U.S. Senate study found federal government computer errors of "hundreds of millions of dollars a year", Senate Committee on Government Operations, *Problems Associated With Computer Technology in Federal Programs and Private Industry: Computer Abuses,* 94th Cong., 2d Sess. 50 (1976), and cited, for example, a 24% error rate in SSI computer checks in 1975, *Id.* at 425, an allegedly erroneous election result caused by "computer error", *Id.* at 433, and various natural occurrences and man-made problems affecting computer reliability. *Id.* at 427 ("Error is a Terror").

The incidence of computer error by utilities brought several federal courts to comment on the "Orwellian nightmare of computer control which breaks down through mechanical and programmers' failures and errors". *Bronson v. Consolidated Edison Co. of New York,* 350 F. Supp. 443, 444 (S.D.N.Y. 1972); *see also Palmer v. Columbia Gas, supra,* 479 F.2d at 158. The risk of error by computer is substantial, not because of its inherent unreliability, but because of the ease of replicating one error a thousandfold and the difficulty of resolving a problem with an impersonal machine.

The reported utility cases reveal a variety of both computer and human errors. Examples include improper late billing, *Trigg v. Tennessee Electric Membership Corp., supra*; billing one person

for the utility use of another, *Palmer v. Columbia Gas, supra*; billing the tenant for the landlord's bill, *Davis v. Weir,* 497 F.2d 139 (5th Cir. 1974); *Koger v. Guarino, supra*; refusing to investigate gas leaks until large bills result, *Palmer, supra*; failure to investigate excessive use of utilities resulting from the landlord's theft of utility services, *Bronson, supra*; *Palmer, supra*; and the instant case of double billings.

These reported cases do not represent isolated mistakes. For example, in *Bronson, supra,* the court noted that the New York Public Service Commission had found that 16% of all complaints investigated resulted in adjustments in favor of the customer. 350 F. Supp. at 448 n.11. The magnitude of such utility errors undoubtedly has provided impetus for many states and municipalities to adopt regulations such as those noted in Appendix A to this brief.

Furthermore, computer and human error are not the only reasons for imposing procedural requirements on MLG&W.[15] MLG&W has exhibited a callous, injurious attitude toward their customers, exemplified by the Crafts' experience. Although the District Court found that the Crafts had a valid dispute with MLG&W and made good faith efforts to resolve the problem, Mrs. Craft was cursed by an MLG&W employee, told to pay her bill twice, and was refused the names of any supervisors to contact to discuss the dispute. (A. 97, 103-4).

The high incidence of error and the callous attitude of some MLG&W employees demonstrate the need for notice and prior hearing to resolve disputes. Such procedural safeguards are necessary to provide customers with protection against unwarranted terminations based solely upon computer determinations.

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[15]In addition to the specific erroneous charges found by the District Court in the Crafts' case, there are at least two other issues not discussed. One related to the "net-gross" billing which is found in the form reprinted in the decision below as Exhibit 7, 534 F.2d at 688. Where a disputed bill is carried forward into a new billing period, the Crafts would always be paying the "gross" amount which includes a late payment penalty. Also, if the Crafts were billed erroneously as if they were two customers instead of one, they would fail to get any quantity discount which MLG&W provided.

3. The Administrative Burden of Additional Termination Procedures is Minimal, and Memphis Has An Interest In Avoiding Erroneous Terminations.

Numerous states and municipalities have adopted customer service regulations [16] providing substantial procedural safeguards prior to termination. As described in Appendix A to this brief, Public Utility Commissions in 15 states [17] have adopted regulations with substantial provisions for notice and hearings before utility termination. Such regulations typically require notice periods of several days; notice of procedural rights, including prior hearing rights; access to company records; an impartial oral hearing of some kind; and a written decision. Some regulations place the emphasis on hearings within the utilities while others place this responsibility in the regulatory commissions. In all cases there is the ultimate possibility of a full evidentiary hearing before an impartial regulatory body. This is in sharp contrast to MLG&W procedures which provide no hearing rights, either before or after termination.

The adoption and continued viability of these regulations demonstrate that minimum procedures are not at all burdensome. For example, although Michigan has one of the most comprehensive customer service regulations, a recent report by the Michigan Public Service Commission found that the

[16]The term "customer service regulations" describes both utility and regulatory practices relating to termination, security deposits, metering, billing, and late payment charges.

[17]Connecticut, Indiana, Massachusetts, Maine, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Rhode Island, South Carolina, Vermont, Washington, and Wisconsin. Fairbanks, Alaska recently adopted extensive regulations. Fairbanks Ordinance No. 3576 (1977). In addition, various municipalities have adopted regulations by consent decree *See McMormick v. Dept. of Water,* Civ. No. C 73-797-4 (N.D. Ohio 1974); *Colgrove v. Cleveland Dept. of Public Utilities,* Civ. No. 74-1007 (N.D. Ohio 1974); *Mathiew v. Brehm,* Civ. No. 74-1521 (E.D. La. 1974); *Allen v. Dept. of Public Utilities,* Civ. No. 403-72-R (E.D. Va. 1973); *Wilkerson v. City of Jacksonville,* CCH Pov. L. Rep. ¶17,442 (M.D. Fla. 1973); *Babcock v. Schaffhauser,* Civ. No. 15,300 (D. Conn. 1972), as amended 1976).

regulations have been a nominal burden on utility companies and have had no impact on bad debt. The key findings of the report are:

> [I]mplementation of the Consumer Standards and Billing Practices has been beneficial to utility customers in the state of Michigan in that they have afforded both the customer and the utility a better understanding of each other and a tolerance for each other's problems.
>
> The following specific conclusions were drawn:
>
> 1. The combined total costs for implementation (as opposed to recurring expenses) of the Billing Practices Rules could not be accurately estimated. . . . If total expenses of implementation were $5 million, the cost would be approximately $1 per customer. . . . *The recurring costs associated with the Billing Practices Rules are believed to be negligible.*
>
> 2. *The Billing Practices had no appreciable negative influence on uncollectable expense and bad debt estimates* in spite of the fact that some companies routinely failed to collect accounts within the time frames permitted by the rules, that Michigan's economy was depressed during the period covered by this study and that deposits were virtually eliminated by the Billing Practices Rules.
>
> 3. The minimum standards in the Billing Practices are being implemented by all companies. Several companies allow customers more time to pay their bills than is required by the Billing Practices Rules.
>
> 4. The medical emergency provision has been invoked on very few occasions. Company apprehensions of misuse of this provision have proven groundless.
>
> 5. The most difficult area for transition was the hearings and appeals provision. Subsequent to implementation of the Billing Practices, *the utilities experienced costs and personnel requirements that have been far less than projected levels.*
>
> 6. *Continuing costs associated with administration of the rules are less than anticipated.* (emphasis added)

Report of the Public Services Commission on the Utility Company Survey of Consumer Standards and Billing Practices of Electrical and Gas Residential Service (Nov. 29, 1976) at 1-2.

One obvious reason for the negligible costs of such regulations is that the hearing usually will not involve witnesses or evidence other than the utility's records and the customer's own story. Billing disputes typically do not require expert testimony, difficult judgments on fault, misconduct or motive, or any balancing of interests.

Nor does the government have a strong interest in immediate termination. In fact, the government's interest coincides with the Crafts' and other MLG&W customers' in avoiding erroneous deprivation.

MLG&W cites its fiscal obligation to all Memphis citizens to justify the lack of procedural protections. However, the possibly delayed payment[18] is not non-payment, particularly since the customer must pay all past and current undisputed charges or face the effective coercion of immediate termination. (A. 76). *See Trigg v. Middle Tenn. Electric Membership Corp., supra*; *Crumley v. Watauga Water Co., supra.* As the Michigan Public Service Commission report, *supra,* documents, even extensive regulations have "no appreciable negative influence on uncollectable expense and bad debt statements". Significantly, MLG&W can recover any losses occasioned by delayed payment through the imposition of late charges (A. 114, 117), application of the deposit (A. 117), or by filing suit.

Fiscal integrity obviously is important for a utility; yet MLG&W cannot cite any evidence that procedural protections may impair its ability to collect proper bills or have any significant effect on its financial resources. Indeed, the only evidence is to the contrary. *See Report of the [Michigan] Public Services Commission, etc., supra.* This minimal government interest is contrasted with the strong state interest of removing dangerous drivers from the highways, *Dixon v. Love, supra,* or protecting the

[18]It is questionable whether any additional delay need result from adoption of procedural protections. Petitioners' regulations currently provide a delay of at least thirty days from billing to termination for non-payment. *See* Petitioners' Brief at 28. Notice and hearing within this period will occasion no further delay.

interests of foster children, *Smith v. Organization of Foster Families, supra.*

Indeed, termination regulations way well enhance MLG&W's financial situation. The Pennsylvania Public Utilities Commission, in proposing extensive new regulations, stated:

> It is anticipated that by implementing these regulations the Commission will be able to deal more expeditiously with consumer complaints, and in the long run, reduce administrative and carrying costs for affected utilities.

Proposed Standards and Billing Practices for Residential Utility Service, 6 Pa. Bull. 2989, Docket No. 76-PRMD-10 (Dec. 4, 1976). In addition, the City of Memphis has a clear interest in avoiding erroneous terminations which may precipitate public health problems from lack of water or illness and death from lack of heat. *See* City of Memphis Code §51-111, et seq.

Based on the severe deprivation, high risk of error, and absence of strong governmental interest, the Crafts are entitled to adequate notice and a meaningful hearing before an impartial decision-maker prior to termination of service. They do not seek the full panoply of rights provided by public utility commissions in numerous states, *see* App. A to this brief, but only those rights necessary to prevent egregious and harmful error. All federal district courts and courts of appeal finding a protected property interest in utility service are in agreement on the minimum due process requirements of adequate notice and hearing prior to termination. *See Craft v. MLG&W, supra*; *Palmer v. Columbia Gas Co., supra*; *Koger v. Guarino, supra*; *Davis v. Weir, supra*; *Dawes v. Philadelphia Gas Works,* 421 F. Supp. 806 (E.D. Pa. 1976); *Donnelly v. City of Eureka,* 399 F. Supp. 64 (D. Kan. 1975); *Condosta v. Vermont Elec. Cooperative,* 400 F. Supp. 358 (D. Vt. 1975); *Cottrell v. Virginia Elec. & Power Co.,* 62 F.R.D. 516 (E.D. Va. 1974); *Limuel v. Southern Union Gas Co.,* 378 F. Supp. 964 (W.D. Tex. 1974); *Hattell v. Public Service Co.,* 350 F. Supp. 240 (D. Colo. 1972); *Bronson v. Consolidated Edison Co. of New York, supra*; *Lamb v. Hamblin, supra*; *Stanford v. Gas Service Co., supra*; *but cf. Jackson v. Metropolitan Edison Co.,* 483 F.2d 754 (3rd Cir. 1973), *aff'd,*

419 U.S. 345 (1974) (dicta, no state action); *Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638 (7th Cir. 1972), *cert. den.*, 409 U.S. 1114 (1973) (same).

MLG&W would have the Court disregard the traditional prior notice and hearing rule. Without any balancing of the interests articulated in *Mathews v. Eldridge, supra,* MLG&W suggests that the "common law remedies" of injunction prior to termination, suit for damages for wrongful termination, and payment under protest are sufficient to satisfy due process.

The common law remedies can be constitutionally adequate in certain specific contexts, such as where strong historical and institutional considerations weigh heavily compared to a minor private interest and a small risk of error. For example, in *Ingraham v. Wright, supra,* an action challenging public school corporal punishment, this Court noted that corporal punishment of public school children was "rooted in history", *Id.* at 1418, and critical to maintaining the discipline and order necessary for proper functioning of the institution. *Id.* at 1418; *see also Taylor v. Hayes,* 418 U.S. 488 (1974) (trial court may punish contemptuous conduct without notice and hearing where necessary to maintain order). For these reasons, and because the risk of erroneous deprivation was slight, *Ingraham v. Wright, supra,* 97 S. Ct. at 1418, the Court was reluctant to become immersed in the daily operation of the public schools or interfere with the necessarily broad discretionary authority vested in local school officials. *Id.* at 1418; *see also Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969); *cf. Goss v. Lopez, supra,* 419 U.S. at 589-91 (Powell, J., dissenting). [19]

In contrast, utilities are natural monopolies with public duties and are subjected to extensive control and regulation intended to protect the public from the arbitrary exercise of monopoly

[19]The Court's reluctance to substitute its judgment for that of local school officials is similar to its reluctance to interfere in the daily operation of a prison. *See Meachum v. Fano,* 427 U.S. 215 (1976).

power. [20] *See, e.g., F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591 (1943). Because the relationship between a utility and its customers is not one of continuing personal supervision, courts have not hesitated to decide issues affecting internal utility management. *See, e.g., F.P.C. v. United Gas Pipeline Co.*, 386 U.S. 237 (1967) (accounting methods for rate determination); *United States v. New Orleans Public Service, Inc.*, 553 F.2d 459 (5th Cir. 1977) (utility's monopoly status permits imposition of Executive Order No. 11246 requiring equal opportunity obligation and permitting inspection of books, even absent consent). In particular, this Court increasingly has become active in curbing the abuse of the monopoly position by public utilities. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1972).

The "common law remedies" also may be adequate constitutionally where the deprivation is not as severe as termination of water, gas and electricity, the remedies supplement existing administrative procedures, and the party is not entirely government owned. *Cf. Lucas v. Wisconsin Electric Power Co., supra,* a pre-*Eldridge* case not involving a balancing of interests, where a privately owned electric utility was regulated by the state public utility commission with its own complaint resolution procedures.

Here, however, MLG&W is a municipally-owned utility providing life-sustaining utility service to Memphis residents, has no hearing procedure either prior to or after termination, is not subject to regulation by, or hearing procedures of, a public utility

[20]In general, the Court has indicated more process is due where, as in this case, the state has a monopoly in the services it renders. *Compare Boddie v. Connecticut,* 408 U.S. 371 (1971) (filing fee requirement for divorce violated due process for indigents where state monopolizes means for legally dissolving marriages) *with United States v. Kras,* 409 U.S. 434, 443-446 (1973) (filing fee requirement for bankruptcy petition not violative of due process since debtor has alternatives) and *Ortwein v. Schwab,* 410 U.S. 656, 659-660 (1973) (no due process violation for filing fee in appeal from adverse welfare decision since welfare recipient had hearing not conditioned on payment of fee).

commission to review its excesses, has no procedure for minimizing computer billing errors, and has only a minimal interest in prompt payment.

Furthermore, the purported "common law remedies" cited by MLG&W are not adequate in Tennessee. The Tennessee courts consistently have held that a utility customer may not be required to pay a disputed bill as a condition of continued service. *Crumley v. Watauga Water Co., supra*; *Trigg v. Middle Tenn. Electric Membership Corp., supra.* Thus, payment under protest is considered an inadequate remedy under Tennessee law. Nor can suit for damages for wrongful termination be considered adequate for residential termination, because the danger to health cannot be evaluated monetarily. *See Stanley v. Illinois,* 405 U.S. 645, 647 (1972) (custody proceedings violated equal protection for unwed father even though custody could have been regained later by adoption); *compare with North Georgia Finishing Co. v. Di-Chem, Inc., supra*; *Fuentes v. Shevin,* 407 U.S. 67 (1972), and *Sniadach v. Family Finance Co., supra* (although deprivation of money and personal property is susceptible to monetary evaluation and suit for conversion was available, procedures violated due process). Similarly, this Court consistently has held procedures violative of due process despite the apparent availability of injunctive relief. *See, e.g., North Georgia Finishing Co. v. Di-Chem, Inc., supra*; *Perry v. Sindermann, supra*; *Bell v. Burson, supra*; *Goldberg v. Kelly, supra.*

Thus, the Crafts submit that the following procedures are the minimum required by due process. The notice should fully and clearly apprise the customer of the utility's proposed action and the reason therefor, the procedures available to the customer to dispute the bill, and the time in which the customer must act to avoid termination. *See Mullane v. Central Hanover Bank & Trust Co., supra,* 339 U.S. at 306. Also, to be meaningful the notice must permit adequate time for the customer to investigate and respond. *Id.*

A customer disputing the bill should be allowed a reasonable time to contact MLG&W about the matter. During this time, his utilities should not be terminated, and if contact is made within this

period, and the dispute not resolved, utility services should be continued pending resolution of the dispute. If the customer does not contact MLG&W during this reasonable period, his utilities may be terminated without further notice.

After notice, if the dispute is not resolved in an initial meeting with an MLG&W supervisor, such as the Superintendent of Credit and Collections, the Supervisor of Credit and Collections, or the Chief Clerk of the Credit Department, a hearing of some kind is necessary. The hearing, to be "meaningful", *Armstrong v. Manzo, supra,* should have three basic requirements in the utility context: 1) an impartial decision maker; 2) the opportunity to present information and rebut the records presented; and 3) a written decision.

While the impartial decision maker may be an employee of the City of Memphis or an independent third party, the decision maker must be truly independent and have sufficient authority to resolve the dispute in the customer's favor. The decision maker's independence and authority are particularly important since there is no statute or regulation under Tennessee law authorizing an appeal.

The actual "hearing" could be informal. However, it must provide the customer the opportunity to present information in support of his position. As stated by the Court in *Londoner v. Denver,* 210 U.S. 373, 386 (1908), a case involving the due process requirements for municipal tax assessments, "a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal."

The opportunity to rebut MLG&W's records is particularly necessary since a computer makes the determination. These records must be presented to the decision maker and also made available to the customer in an intelligible form. Otherwise, the customer will have no meaningful way of disputing the computer's conclusion or knowing its calculations.

Finally, a written decision is important to avoid subsequent disputes based on the same errors. The "decision" may be merely a brief written notice of decision, but it should specifically address the substance of the dispute.

CONCLUSION

Respondents respectfully request that this Court affirm the decision of the Court of Appeals for the Sixth Circuit and hold that Respondents' interest in water, gas and electricity service from Petitioners is protected by the Due Process Clause of the Fourteenth Amendment.

Respondents further request that this Court find Petitioners' procedures for resolving disputes insufficient to satisfy due process. Respondents suggest that the minimum elements of due process include adequate notice and a meaningful hearing before an impartial decision-maker prior to termination, the opportunity to present information and rebut the records presented, and a written decision.

Respectfully submited,

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APPENDIX A

ANALYSIS OF TERMINATION REGULATIONS BY STATE

I. UTILITIES MAY NOT TERMINATE WHILE COMPLAINT IS PENDING BEFORE THE UTILITY OR THE STATE REGULATORY AGENCY

State	*Regulation*
Connecticut	P.U.C. §16-3-100(B)(3)(b)
Illinois	I.C.C. §16
Indiana	P.S.C. Rule 16.1(C)(1)
Maine	P.U.C. §6(A)
Massachusetts	D.P.U. §2-1
Michigan	P.S.C.R. 460.2164(y)
Minnesota	P.S.C. §303(d); §298(b)(4)
Missouri	P.S.C. Rule 40(d)
New Hampshire	Rev. Stat. Ann. 363-B:2 II
New Jersey	N.J.A.C. 14:407-2f
New York	Electric-P.S.C. §143.8(a)
	Gas-P.S.C. §275.8(a)
	Water-P.S.C. §531.8(a)
Rhode Island	P.U.C. §6
Washington	W.A.C. 480-100-071(2)(g)(4)
Wisconsin	P.S.C. 113-132(1)(c)

II. NOTICE OF TERMINATION MUST INCLUDE:

A. Statement of Right of Informal Review with Utility

Illinois	I.C.C. Appendix II
Indiana*	P.S.C. Rule 16.2
Michigan	P.S.C.R. 460.2164(f)
New Hampshire	Rev. Stat. Ann. 363-B:1 I
New Jersey	N.J.A.C. 14:3-7.12(2)

*Incorporated in Statement of Customer Rights

State	*Regulation*
New York	Electric-P.S.C. §143.3(iv) Gas-P.S.C. §275.2(iv) Water-P.S.C. §531.2(iv)
Rhode Island	P.U.C. §4(c)(4)
Washington	W.A.C. 480-100-071(2)(b)

B. Right to Request Hearing with State Regulatory Agency

Indiana*	P.S.C. Rule 16.2
Massachusetts	D.P.U. §2.3
Maine	P.U.C. §3(E)
Michigan	P.S.C.R. 460.2164(f)
New Hampshire	Rev. Stat. Ann. 363-B:1 I
New Jersey	N.J.A.C. 14:3-7.12(1)
Rhode Island	P.U.C. §4

C. Statement of Action Needed to Avoid Termination

Illinois	I.C.C. §15
Indiana	P.S.C. Rule 16(E)(2)
Maine	P.U.C. §3(B)
Massachusetts	D.P.U. §2.3
Michigan	P.S.C.R. 460.2164
Minnesota	P.S.C. 300(e)
Missouri	P.S.C. Rule 35
New Hampshire	Rev. Stat. Ann. 363-B:1 I
New York	Electricity-P.S.C. §143.2 Gas-P.S.C. §275.2 Water-P.S.C. §531.2
Rhode Island	P.U.C. §4(c)(2)
Washington	W.A.C. 480-100-071(2)(b)
Wisconsin	P.S.C. 113-132(9)(c)

*Incorporated in Statement of Customer Rights

State	*Regulation*

D. Statement That Service May Not Be Terminated Pending Resolution of Dispute

Indiana*	P.S.C. Rule 16.2
Connecticut*	P.U.C. 16-3-100(c)(1)
Maine	P.U.C. §3(E)(vi)
Massachusetts*	D.P.U. §2.3
Michigan	P.S.C.R. 460.2164(h)
Minnesota*	P.U.C. 16-3-100(c)(1)
New Hampshire*	Rev. Stat. Ann. 363-B:1 I

III. UTILITY MUST INVESTIGATE AND ATTEMPT TO RESOLVE DISPUTE

Connecticut	P.U.C. 16-3-100(c)(4)
Illinois	I.C.C. §15
Indiana	P.S.C. Rule 16.1(A)(2)
Maine	P.U.C. §6(A)
Massachusetts	D.P.U. §2.4(1)
Michigan	P.S.C.R. 460.2142
Minnesota	P.S.C. 303(a)
Missouri	P.S.C. Rule 25(a), 26, 40
New Hampshire	Rev. Stat. Ann. 363-B:2:I
New Jersey	N.J.A.C. 14:407-2f
New York	Electric-P.S.C. §143.8(a) Gas-P.S.C. §275.8(a) Water-P.S.C. §531.8(a)
Rhode Island	P.U.C. §5(a)
Washington	W.A.C. 480-100-096(1)
Wisconsin	P.S.C. 113.132(1)(c)

IV. PENDING RESOLUTION OF DISPUTE UTILITY MUST INFORM CUSTOMER OF RIGHT TO APPEAL TO STATE REGULATORY AGENCY

Connecticut	P.U.C. 16-3-100(c)(4)
Illinois	I.C.C. §20

*Incorporated in Statement of Customer Rights

State	*Regulation*
Indiana	P.S.C. Rule 16.1(A)(3)
Maine	P.U.C. §6(B)
Massachusetts	D.P.U. §2.4(1)
Michigan	P.S.C.R. 460.2169(8)(a)
New Hampshire	Rev. Stat. Ann. 363-B:2 III
New York	Electric-P.S.C. §143.8(b)
	Gas-P.S.C. §275.8(b)
	Water-P.S.C. §531.8(b)
Rhode Island	P.U.C. §6
Washington	W.A.C. 480-100-096(3)
Wisconsin	P.S.C. 113.132(1)(d)

V. RESULT OF HEARING WITH UTILITY MUST BE IN WRITING

Connecticut	P.U.C. 16-3-100(c)(4)
Indiana	P.S.C. Rule 16.1(A)(2)
Massachusetts	D.P.U. §2.4
Michigan	P.S.C.R. 460.2169(9)
Missouri	P.S.C. Rule 42(b)
New York	Electric-P.S.C. §143.8(b)
	Gas-P.S.C. §275.8(b)
	Water-P.S.C. §531.8(b)

APPENDIX B

Tenn. Code Ann.

6-1306. Exemption from utilities regulation.—It shall not be necessary for any municipality, proceedings under this chapter, to obtain any certificate of convenience or necessity, franchise, license, permit, or other authorization from any bureau, board, commission or other like instrumentality of the state in order to acquire, construct, purchase, reconstruct, improve, better, extend, maintain and operate any public works.

6-1317. Exemption from utilities commission.—No requirements or provisions of this chapter shall be construed so as to deprive any municipality issuing bonds pursuant hereto of the exemption heretofore granted to municipalities from the jurisdiction of the public service commission.

Code of Ordinances, City of Memphis:

Article V. Basic Facilities

DIVISION 1. REQUIRED FACILITIES

Sec. 51-111. Compliance with division.

No person shall occupy as owner-occupant, or let to another for occupancy, any dwelling unit for the purpose of living, sleeping, cooking or eating therein which does not comply with the requirements of this division. (Ord. No. 1724, §400.0, 3-22-66)

Sec. 51-112. Sanitary facilities.

(a) *Generally.* The minimum sanitary facilites specified in this section shall be supplied and maintained in sanitary and safe working condition.

(b) *Water closet.* Every dwelling unit shall contain within its walls a room, separate from the habitable rooms, which affords privacy and which is equipped with a water closet. Entry to such room shall be from within the unit only.

(c) *Lavatory.* Every dwelling unit shall contain a lavatory, which shall be in close proximity to the water closet.

(d) *Bathtub or shower.* Every dwelling unit shall contain a room which affords privacy to a person in the room and which is equipped with a bathtub or shower.

(e) *Kitchen sink.* Every dwelling unit shall contain a kitchen sink apart from the lavatory required by subsection (c).
(Ord. No. 1724, §§401.0—401.4, 3-22-66; Ord. No. 25, §16, 10-10-67)

Amendment note—Ord. No. 25, §16, amended §51-112(b) by adding the last sentence thereto.

Sec. 51-113. Water and sewer system.

Every kitchen sink, lavatory basin, bathtub or shower and water closet required under the provisions of section 51-112 shall be properly connected to either a public water and sewer system or to an approved private water and sewer system. All sinks, lavatories, bathtubs and showers shall be supplied with hot and cold running water. (Ord. No. 1724, §402.0, 3-22-66)

Sec. 51-114. Water heating facilities.

(a) Every dwelling unit shall be supplied with water heating facilities which are installed in an approved manner, properly maintained, and properly connected with hot water lines to the

fixtures required to be supplied with hot water under section 51-113. Water heating facilities shall be capable of heating water to such a temperature as to permit an adequate amount of water to be drawn at every required kitchen sink, lavatory basin, bathtub, shower, and laundry facility or other similar units, at a temperature of not less than one hundred thirty (130) degrees Fahrenheit at any time needed.

(b) Every water heating facility shall be installed and shall operate in accordance with the requirements of the building code and the air pollution control ordinances* of the city. (Ord. No. 1724, §§402.1, 403.1, 3-22-66)

Sec. 51-115. Heating facilities.

(a) Every dwelling and multi-family dwelling shall have provisions for heating facilities. The owner of the heating facilities shall be required to see that they are properly installed, safely maintained and in good working condition, and that they are capable of safely and adequately heating all habitable rooms, bathrooms and toilet rooms located therein.

(b) Every heating facility shall be installed and shall operate in accordance with the requirements of the building code and the air pollution control ordinances* of the city. (Ord. No. 1724, §§403.0, 403.1, 3-22-26; Ord. No. 25, §17, 10-10-67)

Amendment note—Ord. No. 25, §17, amended §51-115(a) which prior to amendment designated the temperature to which the heating facilities should be capable of heating the rooms therein listed.

***Cross reference**—Air pollution, Ch. 3.

Sec. 32-103. Well digger's permit.

No person shall engage in drilling, boring, digging or otherwise constructing or repairing wells in the city without a permit from the department of health. Such permit shall be granted by the health department to any person upon application properly approved by the health officer, and such permit shall be in force and effect for one (1) year from the date of its issuance. The health officer shall have the power and it shall be his duty to revoke any permit issued where it is made to appear that the provisions of this article have been violated by the person engaged in well construction. The holder of such permit shall, after such revocation, have the right of appeal to the board of commissioners. (Code 1949, §1242)

Sec. 32-104. Permit to operate and maintain private supply.

(a) No person shall operate or maintain a private water supply until a permit therefor has been issued by the department of health, which permits shall not be valid for longer than one year and may be renewed at the expiration thereof upon payment of the fees hereinafter set out. All permits shall be in writing. Such permit may be revoked by the health officer upon the violation by the holder of any of the terms of this article, or in any emergency when, in the judgment of the health officer, the continued operation of the private water supply will be a public health menace. The holder of such permit, after such revocation, shall have the right of appeal to the board of commissioners.

(b) The yearly permit to operate or maintain a private water supply shall not be issued until an inspection fee is paid each year to the department of health. A fee of one hundred dollars ($100.00) shall be paid by the owner of one private water supply well, whether shallow, deep, abandoned or condemned. An additional charge of twenty-five dollars ($25.00) shall be paid for each additional well whether operating or not. The fee shall be due and payable on or before January 31 of each year. (Code 1949, §§1239, 1240; Ord. No. 352, §1, 12-31-68)

Sec. 32-105. Approval of plans and specifications for private supply.

Before work is commenced on the construction of any new well or private water supply, or any additions, alterations or changes, including cross connections, treatment, settling and storage tanks, aerators, wells, suction lines and any other part of such private water supply listed in any regulations adopted by the department of health, complete plans and specifications, accompanied by such pertinent data as may be required, shall be submitted, by the owner or his agent, to the department of health, and no part of the work shall be commenced until the department has given its written approval. (Code 1949, §1241)

Sec. 32-106. Approval of plans and specifications for sewer work on property served by private supply.

Before any work is commenced on the construction of any sewers, sewage treatment plants, or any part of the sewerage system constructed underground, or any additions, alterations or major changes to an existing sewerage system on private property on which there is a private water supply, complete plans and specifications, accompanied by such pertinent data as may be required, shall be submitted by the owner or his agent to the department of health, and no part of the work shall be commenced until the department of health has given its written approval; provided, that this does not include changes and repairs to plumbing in buildings and above the ground which is controlled by the plumbing inspector of the city. (Code 1949, §1243)

Sec. 32-107. Location, construction and operation of private supplies.

All private water supplies shall be properly located, constructed and operated, and be of an approved quality. (Code 1949, §1245)

Sec. 32-108. Inspection of private supplies.

All private water supplies shall be open for inspection at all times by the health officer or the light, gas and water division. (Code 1949, §1245)

Sec. 32-109. Location, construction and operation of wells generally.

All wells shall be located, constructed and operated in accordance with the *rules and regulations adopted by the department of health, and the water shall be of a safe, sanitary quality.*

No well shall be located close enough to any existing or proposed well of the light, gas and water division of the city to materially affect the static head of water from the underground strata of any such well or proposed well of the public supply. (Code 1949, §1244)

Sec. 32-110. Location of wells in street, alley or public place.

No well shall be located in a street, alley or public place without a permit from the board of commissioners.

Any person making application for a permit to construct a well in any street, alley, or other public place shall be required, as a condition precedent to the issuance of such permit, to agree that if at any time subsequent to the construction of such well it shall become necessary for the city to use such street, alley, or other public place, for any public purpose, such person shall, within ninety (90) days after the receipt of notice from the city, abandon, dismantle, and fill such well, at his own expense. (Code 1949, §1244)

Sec. 32-111. Filling of abandoned or condemned wells.

The health department may order the owner to fill up any abandoned or condemned well. (Code 1949, §1244)

Cross reference—Open and uncovered wells prohibited, §22-20.

Supreme Court, U. S.
FILED
JUL 8 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-39

MEMPHIS LIGHT, GAS AND WATER DIVISION, *et al.*,

Petitioners,

v.

WILLIE S. CRAFT and MARY CRAFT,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL COUNCIL OF THE CHURCHES OF CHRIST

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July 7, 1977

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BRIEF FOR AMICUS CURIAE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST

INTERESTS OF THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST

The National Council of the Churches of Christ (the "Council") is a cooperative agency of thirty national religious bodies of the Protestant, Anglican and Eastern Orthodox traditions in the United States, numbering

over 40,000,000. The Council is organized for religious purposes. One of the means by which it promotes its purposes is to "Study, and to speak and to act on conditions and issues in the nation and the world which involve moral, ethical, and spiritual principles inherent in the Christian Gospel".

The Council believes that several aspects of the provision and termination of utility services, particularly for those most likely to be subject to such termination, involve moral, ethical and spiritual principles inherent in the Christian Gospel. The Council, accordingly, pursuant to its charter, deems it to be its duty "to speak and to act" before courts and other agencies considering and declaring the rules and guidelines applicable to such termination.

QUESTIONS PRESENTED

1. Whether the right, under state law, of a subscriber for water, gas and electricity service from a municipally owned utility company, to receive such service, is an interest protected by the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the process followed by petitioners in terminating the utility to respondents meets the standards of procedural due process.

STATEMENT OF THE CASE

As our society, particularly our urban society, becomes more complex and interdependent, the ability of individuals and families

to secure their basic food, clothing and shelter moves more and more beyond their own capacities. The heat, light, water, plumbing and food storage that depend upon utility services are necessities in the strictest sense. Within hours of the termination of such service subscribers therefor and their families and children may be as helpless as an infant suddently cast outdoors on a frigid winter night. Details of the results of some of the more recent terminations of services are in a large number of Council files. A few examples appear below.

During the frigid winter of 1976-1977 the utter dependence upon utility service for life itself was demonstrated, in tragic fashion, to the Council and other public and private agencies concerned with the physical and spiritual welfare of those dependent upon such services. On January 11, 1977, according to an account in the January 12th issue of the Mansfield, Ohio News Journal, Eugene Kuhn, 74 years of age, "was found frozen in bed...after his electricity had been turned off for non-payment of bills". The bills which Mr. Kuhn owed aggregated $18.36, covering services for a period of two months. The coroner found that Mr. Kuhn died eight hours after the power cut-off.

Later during the same winter, the Public Utilities Commission of Ohio forebade gas utilities from discontinuing service for any reason. The order expired on March 31, and on the same day the Commission voted 2 to 1 not to extend the ban for another 30 days. An account of some of the results of the moratorium's end appeared in the April 7, 1977 issue of the Cleveland Plain Dealer, a copy of which

is appended to this brief. Procedures used by some Ohio utility companies terminating services in early April are described in an article in the April 6th issue of the Columbus Dispatch, a copy of which is likewise appended.

Two children died and their mother was critically burned in a Brooklyn fire, apparently caused by a candle, being used because the Consolidated Edison Company of New York had turned off power in their building in the belief that the house was vacant. The account of the children's death is in a New York Daily News article in the issue of May 12, 1977.

In the files of the Council is a copy of the Grand Jury Report of the Grand Jury of Schenectady County, New York, for the January 1974 term of the Supreme Court of New York State, Schenectady County. There follow excerpts from that report.

> "On December 24, 1973, Frank Baker and Katherine Baker, his wife, were discovered by their grandson, Basil Heise, to have perished in their home at 802 Arch Street in the City and County of Schenectady, New York. Frank Baker was 93 years old and his wife 92. They died from cardiac arrest precipitated by age and exposure. There was no central heating in their home as the gas furnace was de-activated when the Niagara Mohawk Power Corporation discontinued the electrical service on or about December 20, 1973. In connection with their death, there was no evidence of violence or foul play.

* * *

The Niagara Mohawk Power Corporation supplied both electricity and gas for heating and cooking to the Baker home for many years. The company had a security deposit of seventy dollars ($70.00), interest of $4.90 was credited to the Bakers account annually for this deposit. In the Spring of 1973, the Baker's bill with Niagara Mohawk began to accumulate until it reached a high of two hundred ninety-three dollars and forty-eight cents ($293.48) on May 23, 1973. On June 4, 1973, the electric power was discontinued and it was restored in August or early September 1973. The restoration of the power was the result of payments on the Baker's account. Apparently, Mr. Baker paid $100.00 and the St. Vincent DePaul Society of the St. Columba's Church paid $120.00 as arranged by Father Murphy.

The Baker's arrears on their bill rose to $208.83 in early December. On the 27th day of November, 1973, the required notice was mailed to the Bakers at their Arch Street address. This notice was found in the Baker home on December 24, 1973. The envelope in which the notice was mailed was opened. On December 13, 1973, the collectors for Niagara Mohawk visited the Bakers to determine the reason for non-payment and to collect on the account if possible. Mr. and Mrs. Baker were informed of the arrears and of the consequences of non-payment. Mr. Baker denied owing the bill, but Mrs. Baker was quoted as saying, 'I knew you would get into trouble.' It is not clear whether the Bakers really understood the nature of this bill or if they understood the consequences of a disconnection of power. On December 20, 1973, the power was disconnected by a lineman at the

pole outside of the Baker home. This resulted in the deactivation of their furnace and their home was without heat."

Finally, this Court is respectfully requested to consider two letters sent to a Community Action Council for the City of Schenectady, both of which are self explanatory. One of the letters is reproduced in a footnote below.* A copy of the second letter, with all of its self-evident grammatical errors, is appended hereto.

---

* Dated April 25, 1977

Dear Mr. Dusenberry,

My name is Donna Carosella and I live at 1194 South Country Club Drive in Schenectady.

I am writing to inform you that on Thursday, April 14, 1977, while I was at work and no one was home at my house, Niagara Mohawk came to my home and turned my heat off without speaking to anyone at my home.

I have a five year old son who is always getting bronchitis and it was pretty cold that night.

I hope soon that something will be done about things like this happening to people.

Yours truly,

Mrs. Donna Carosella

(Spelling and grammar corrected)

ARGUMENTS

POINT I

THE TERMINATION OF UTILITY SERVICES BY A MUNICIPAL UTILITY IS GOVERNED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment forbids any state to deprive "any person of life, liberty or property without due process of law". Petitioners (defendants below) are a municipally owned utility and some of its officers and employees. Their actions are state actions wthin the requirement of state action under the due process clause. Davis v. Weir, 497 F.2d 139, 143 (5th Cir. 1974).

Utility services such as those supplied to respondents by petitioners are basic to life, safety and health. As stated in Uhl v. Ness City, Kansas, 406 F.Supp. 1012 (D. Kan. 1975), an action in which residents of Ness City challenged local ordinances providing for termination of municipal water service upon non-payment of solid waste collection fees:

> "By threatening to deprive residents of water, an absolute necessity of life, in order to collect a service charge for other municipal functions, the defendant cities have chosen an effective and oppressive collection method. It is apparent to the Court that this means of enforcing an ordinance bears no reasonable relationship to its purpose, i.e., to protect the general welfare and improve the living conditions of city residents. Termination of all access to water would immediately threaten the health, life and well being of any resident of the

defendant cities." (Id. at 1018).**

The right to receive such services is also a right of property under applicable Tennessee state law. Crumley v. Watauga Water Co., 99 Tenn. 420, 41 S.W. 1058 (1897); Trigg v. Middle Tennessee Electric Membership Corp., 533 S.W. 2d 730, 733 (Tenn. App. 1975).

It is unnecessary to classify a utility subscriber's entitlement to utility services as a "right" or a "privilege". See, Morrissey v. Brewer, 408 U.S. 471 (1972); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232 (1957).

The loss of utility services may be "grievous", just as much or even more than the loss of employment or the loss of welfare benefits. See, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S.123, 168 (1951) (Frankfurter, J., concurring); Goldberg v. Kelly, 397 U.S. 254, 263 (1970). The process

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**This action may be distinguished from Jackson v. Metropolitan Edison Company, 483 F. 2d 754 (3rd Cir. 1973), aff'd 419 U.S. 345 (1974), in which the Supreme Court rejected plaintiff's claims on the state action point. The Court of Appeals in the Third Circuit referred to electricity, "in today's urban society", as something which "does much to make life more comfortable and convenient...", the absence of which "in the usual situation does not pose an immediate threat to the life of the occupants". (Id. at 759-60). This action concerns the termination of water service, as well as electricity, and the deaths of the past frigid winter in Ohio and elsewhere would seem t be sufficient proof that electricity may be more than a comfort or a convenience.

used to deprive a person of the service must be "due process", the precise dictates of which depend upon the nature and extent of the interest.

POINT II

THE PROCEDURES ACCORDED RESPONDENTS BY PETITIONERS FALL SHORT OF THE PROCEDURAL DUE PROCESS MANDATED BY THE DUE PROCESS CLAUSE.

A. The General Principles of Procedural Due Process.

Procedural due process has been said by this Court to be "perhaps the least frozen concept in our law". Griffin v. Illinois, 351 U.S. 12, 20-21 (1956). (Frankfurter, J. concurring) More recently, in Mathews v. Eldridge, 424 U.S. 319 (1976), the court stated:

> "[D]ue process," unlike some legal rules is not a technical conception with a fixed content unrelated to time, place and circumstances... [D]ue process is flexible and calls for such procedural protections as the particular situation demands. 424 U.S. at 334. (citations omitted).

In Goldberg v. Kelly, supra, the Supreme Court held that procedural due process required an evidentiary type of hearing by the Department of Health, Education and Welfare before it might terminate welfare benefits. The elements of that hearing, as stated in Mathews, were:

"(1) 'timely and adequate notice detailing the reasons for a proposed termination'; (2) 'an effective opportunity [for the recipient] to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally'; (3)retained counsel, if desired; (4) an 'impartial decisionmaker'; (5) a decision resting 'solely on the legal rules and evidence adduced at the hearing'; (6) a statement of reasons for the decision and the evidence relied on." 424 U.S. at 325 n. 4. (Citing Goldberg v. Kelly, supra).

In Morrissey v. Brewer, supra, the Supreme Court, after concluding that due process necessitated a hearing prior to any revocation of parole, prescribed the procedures for a "pre-probable cause" type hearing, followed by a more formal evidentiary hearing, the "minimum requirements" of which were then stated in substantially the same manner as the Goldberg-Mathews statements.

Mathews v. Eldridge, supra, involved a challenge to administrative regulations of the Department of Health, Education and Welfare for the termination of benefits under the Social Security Law in cases of disputed disability. This Court set out as a guide "three distinct factors" to resolve the "kind of hearing" problem. After stating the flexibility of procedural due process, it held:

"Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected...More precisely, our prior decisions indicate that identification

of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 334-35. (citations omitted).

In the final analysis the test of due process is basic fairness, the concept of which incorporates "high social and moral values inherent in the procedural safeguard of a fair hearing..." Joint Anti-Fascist Refugee Committee v. McGrath, supra. "The high social and moral values inherent [in procedural due process]" are, of course, the values which the Council particularly seeks to have incorporated in the whole of our body of laws, substantive and procedural.

The Council respectfully submits, as particularly important in defining the process for the termination of utility services by a municipal utility, the fact that life itself may depend in some cases upon the provision of such services, that in many other cases the health and safety of children, the elderly, and other groups particularly requiring the protection of an ethically operating governmental machinery, depend upon such services.

B. The Procedures Followed by Petitioners Fall Short of The Constitutional Requirements.

The question of whether the petitioners' procedures meet or fall short of the constitutional tests of procedural due process can best be considered by discussion, seriatum, of the three distinct Mathews v. Eldridge factors, followed by application of the more general test of basic fairness.

1. The private interests involved.

The first of the Mathews factors is that of "the private interests that will be affected by the official action". In Mathews, that interest was the interest of a claimant of social security benefits.

The private interests affected can, of course, be measured in several different ways. Simplest but perhaps most unjust would be the monetary measure. To the subscriber, the termination of services may mean misery, illness or even death if the service is turned off. To the utility it is the loss of an infinitesimal fraction of its operating revenues.

Consideration must, of course, be accorded to the problems of the utility generally if it is denied in a large number of cases the remedy of termination without recourse to any legal process. Such termination is, however, a kind of self-help, used as a substitute for legal process, that is all but obsolete in a complex and highly industrialized society. Prejudice of two sorts may result from such exercise of self-help:

(a) The subscriber loses all opportunity to interpose any defense to the utility's claims for the amounts purportedly owed to it.

(b) In the event that there is no real defense, the sanction suffered by the subscriber, ranging from minor inconvenience to death, may be altogether out of proporton to the civil wrong of failure to pay the amount due.

Were the wrong inflicted by the subscribe upon the utility company a criminal wrong, the sanction suffered by the subscriber at the hand of the utility would, in many cases be a cruel and unusual punishment. A fortiori, procedural due process should be sufficiently fluid to prevent such punishment for the civil offense of failure to pay utility charges.

2. The results of the procedures used and the value of the additional safeguards.

The second Mathews factor is that of:

> "The risk of erroneous deprivation of [the private interest that will be affected by the official action] through the procedure used and the probable value, if any, of additional or substitute safeguards.

Little need be said about the first half of this second factor. The record proves that there was an erroneous deprivation of the Crafts' rights. After the removal of the extra meter they continued for two months to receive double computer billings (R. 9). The fact of the double billings was ascertained only after the Crafts went to Court. The computer failures were built into the system. The human judgmental factors were wiped out.

Respondents' due process claims are, in essence, claims for the interposition in the termination process of a human factor. The means of interposing that human factor is the observance of the traditional notice and hearing, which lie at the heart of procedural due process. A computer may listen; it does not hear. Petitioners' computers were programmed to send form notices of termination in the event that the amount the machine noted as due was not paid by the end of a day stated.

The Council submits that such dehumanization of the process by which the utility is supposed to make a rational and reasonably humane judgment of whether to turn off utility service is offensive to the basic concepts of fairness which are inherent in due process. It violates particularly the "high social and moral values inherent [in procedural due process]. Joint Anti-Fascist Refugee Committee v. McGrath, supra.

The Council does not state a position as to the details of the additional safeguards to be added to the petitioners' procedures. It concedes that not all of the elements of an adversary process are necessary. Fair notice and hearing which will prevent the unjust and sometimes tragic consequences of the nature described earlier in this brief are required. See, Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267 (1975).

3. The fiscal and administrative burdens of the additional safeguards.

The Council, as do respondents, believes that the specifics of the process which should be mandated should be determined upon remand of the action to the District Court. Those specifics should, of course, take due account of both 1) the administrative burdens upon the petitioners and other utility companies of the procedure considered; and 2) the costs and hazards to the subscriber avoided by the imposition upon the utility of such administrative burdens. The variety of procedures which would take reasonable account of both of these factors is clear from respondents' brief and the Appendix thereto.

In some cases those costs and hazards to subscribers, who may be wholly without fault or guilty of only minimal negligence, may be their very lives. Just as a basic principal of our criminal law is to place a greater importance on protection of the innocent from wrongful conviction than on certainty of conviction of all who have breached the laws, so should the avoidance of the wrongful imposition of unfair penalties upon utility subscribers guilty of no wrong or of only a slight civil offense be deemed paramount, as against the importance of collection of amounts due.

A second important factor in weighing the amount of the costs or the severity of the administrative burden cast upon the petitioners by additional safeguards in the preservation of some vestiges of humanness in the operation of the utility, which will be apparent to the subscribers. Even in the case of a private utility, and more so in the case of a municipal utility, to most of the subscribers who are concerned with possible termination of services, the Company is the State. It is the government, the set of institutions which they must respect and

obey.

The Council submits that the institutions of government, of which the law is one, must be just and seen to be just if government itself is to be respected. If the institutions of government are so computerized or otherwise dehumanized as to eliminate human judgment altogether, respect for the law and government suffers, and the basic fabric of society is weakened.

CONCLUSION

Termination of utility services by a municipal utility company is subject to procedural due process. Notice and a hearing, providing for the exercise of a human and humane judgment, are required under the applicable Supreme Court rulings. The procedures followed by petitioners herein violated the standards of those rulings. The matter of the specific procedures should be remanded to the District Court, under appropriate directions by this Court as to notice and a hearing.

Respectfully submitted,

DAVID SIVE

Attorney for Amicus Curiae
National Council of The
Churches of Christ

APPENDIX

— THE PLAIN DEALER, THURSDAY, APRIL 7, 1977 —

* * *

500 Ohio families chilled by no-pay gas shutoffs

By the Associated Press

Natural gas shutoffs spread across the state yesterday, leaving at least 500 families without heat because they are behind in paying their gas bills.

The Public Utilities Commission of Ohio last week refused to extend the moratorium on gas company shutoffs beyond April 1.

Bulk of the shutoffs have been by the Cincinnati Gas & Electric Co., the West-Ohio Gas Co., which serves the Lima area, and the Clintonian Fuel & Oil Co. at Buckeye Lake.

A CG&E spokesman said the company since March 26 has visited more than 3,700 customers, each of whom owes the company at least $300. The company said customers who failed to make payment arrangements were disconnected.

On Jan. 26 PUCO issued an order making it illegal to shut off gas service for any reason until April 1. The order was to keep people hit by high bills from freezing to death. Temperatures were still below freezing across much of the state yesterday.

West Ohio Gas has shut off service to 40 customers as has Clintonian.

The state's other large gas companies reported no shutoffs and said they expect to make none until at least mid-April.

All utilities have been ordered by PUCO to advertise extended payment plans.

* * *

B-4 Columbus Dispatch Wed., April 6, 1977

Company Moves Fast On Ruling

By The Associated Press

The moratorium on gas service shutoffs ended at midnight April 1 and 15 minutes later a gas company worker was at Roy Dreyfus' door to take away his meter.

"It was a surprise, I'll tell you.

"THE DOG BARKED. I jumped out of bed and there he stood with his little helmet on his head and a wrench in his hand," Dreyfus recalled.

He owed the company $173. His last bill arrived only hours before the Clintonian Fuel and Oil Co. paid its call.

"That bill wasn't even due until April 10," Dreyfus complained Tuesday.

CLINTONIAN, A small gas company with 1,830 customers, shut off another 39 households that same morning in the central Ohio community of Buckeye Lake, said General Manager Harold Edgington.

Why so soon after midnight?

"It was April first," Edgington said.

ON THAT DAY a Public Utilities Commission of Ohio order prohibiting gas companies from shutting off service for any reason expired and the PUCO had refused before to extend the moratorium.

Chairman C. Luther Heckman had said he didn't think there would be any shutoffs until mid-April. Then, he said, the PUCO order for companies to advertise extended payment plans would allow everyone to eventually pay bills and not lose service.

Clintonian placed two advertisements in the Buckeye Lake Shopper, a local newspaper that winds up in post office boxes. There is no home mail delivery in the central Ohio community of 3,000.

ON MARCH 30, 35 hours before the shutoffs began, the paper was distributed and carried this advertisement:

"Notice to Clintonian Consumers:

"Unless sufficient arrangements are made on delinquent gas bills, service will be terminated April 1. Service will not be reinstated until bill is paid in full and deposit is uprated to $100. Any gas terminated for 30 days or more at any one location will be considered as permanent termination thus better enabling us to have a more adequate supply for our paying customers."

THE COMPANY confirms Dreyfus' charge that he received no notice of the impending loss of service in the mail, nor was he contacted in person or by telephone.

Dreyfus, who lives in the house with his wife and two sons, says he's cold.

"We've got an electric heating pad that my wife keeps on her chest," he said. "She's got emphysema and catchs colds very easily."

THE TEMPERATURE Tuesday night was to have dipped to below 20 and snow flurries were expected. Wednesday's temperature was not expected to warm much with highs predicted in the high 30s or low 40s.

What about cooking?

"Well, we have a gas stove so that's out. We're buying hamburgers and the like."

DREYFUS SAID he wants to pay, but hasn't got the $273 it would now cost him to have his meter reinstalled.

"I didn't know this was coming. The wife called the next morning (after the meter was removed) and offered to make payments. The PUCO was telling everybody that we could do that. But they said: 'There's only one way, you pay us what you owe us.'"

Edgington confirmed that it was company policy to require people like Dreyfus to pay it all now.

"WE GAVE THEM notice in the paper," he said.

Twelve customers who lost their meters that early morning have managed to pay the back bills plus the new $130 deposit.

DREYFUS, A maintenance superintendent at the Ohio Medical and Correctional Center in Columbus, said he got behind in January when he couldn't pay his January bill for $71. Ohio's coldest winter in history pushed the unpaid bill up to $173 by late March.

(Letter received by the Community Action Council for the City of Schenectady; typed, but otherwise uncorrected.)

My name is Phyllis Taylor I live at 2440 Ave. B ext Schenectady N.Y. I have three childrens and Iam on public assitance. This is how my story is and hard ships. A few times the walfar had to pay Nidgagara Mohawk bill because I didn't have the proper amount to pay it my alowence is $50.00 a month in the cold times of the year which my highlest bill was $168.00 I didn't even have half of it so I got so far in the root so I got sick to my stomach and hd to have help I mean help. I get $26.00 in the spring time. So a man came over from Nidgaria Mohawk one day in told me I owed $826.63 that the walfar payed $456.00 he said I had to go down and make some aragment on how I can pay my bill so I went down and talked with some one and I told him I just can possible pay my bill because the public assistance are taking from my budget $41.00 a month so that teares $9.00 left how can I possible pay a $79.00 bill or $168.00 I can't do that I am drive my self crazy that how I feel the man I am sorry I don't recall the man name but he made me feel like a snake in grass I all most cryed he told me it wouldn't let the man in to shut it off in my celler. I have 2 childrens who has chicken pos I told him so he left he said I would be hearing from him soon. So I went back to the walfar department and they told me that all they can payed $456.00. But my problems is by the time they take money from my check of 41.00 I have no money left to pay my bill for the next month bill. So it just keeps on getting worst and harder for me. Iam not proud that I an on assitance but thing happen I have no other way to support my childrens I am blind in one eye and barly

see out of my right eye. So that when I had to go see Fred M. Dusenbury of Schenectady Community Action Program 75 Lafayett Street. And he called nidgaria Mohawk and told them my situation I aso had $80.00 worth of meat in my freezer that all I had to last till the first of next month. I know deep down in my heart I can have light and gas for nothing but I can't pay my bill off I don't have the proper means to pay it off. So I would like a hearing on it. Thank you

Phyllis Taylor
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